(1)

91-2029

No.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JRR REALTY and HOLLAND HOUSE TENNANTS CORPORATION

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Where an Employer is ordered to "make-whole" employees and it then fully settles all claims for wages and benefits with them and the NLRB, is a subsequent NLRB Order that directs payments to various Union Welfare Funds "speculative" rather than "actual" and an improper windfall and penalty on the Employer? (A Second Circuit decision conflicts with the instant case on this issue).

2. Is a successor employer, who was not a party to the original proceeding before the NLRB, bound to honor the predecessor's labor contract after the date of its takeover because of its knowledge of the pendency of the proceeding?

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OPINIONS BELOW

The opinion of the United States Court of Appeals below, Docket No. 91-1159, is unreported. It is appended hereto in the Appendix. That opinion enforced an Order of the National Labor Relations Board (hereinafter "Board" or "NLRB".)

The opinion of the NLRB below is reported at 301 NLRB #67 (1991). Said Order adopted and modified the findings of the Board's Administrative Law Judge (hereinafter "ALJ".) Both opinions are appended hereto in the Appendix.

JURISDICTION

The Court of Appeals Order is dated February 21, 1992. A timely Petition for Rehearing was denied on April 23, 1992. Stay of mandate was granted by the Court on May 19, 1992.

The statutory provision believed to confer jurisdiction on this Court to review the Order in question is 28 USC Sec. 1254(1).

REASONS FOR GRANTING THE WRIT

The D.C. Circuit's instant decision conflicts with a previously issued Second Circuit case on the issue of the National Labor Relations Board's remedial power to order payments to a Welfare Fund to remedy an unfair labor practice where such payments provide a windfall and, in effect, punish the employer. The D.C. Circuit has upheld this Board remedy despite no proof of losses by employees and no proof of Fund payments for health claims of employees. The Second Circuit has clearly rejected this Board remedy where employees suffered no loss of benefits fully settled any claims and no longer have an economic stake in the further stability of the Funds. This Court last spoke on the Board's remedial authority in 1984.

Moreover, the D.C. Circuit's decision exhibits a marked departure

from this Court's holding in Burns Security v. NLRB, and Golden State Bottling v. NLRB, regarding the rights of a successor employer regarding its predecessor's contract. As this Court recognized in Howard Johnson v. Hotel Restaurant Employees, a successorship question requires an emphasis on the facts of each case as it arises due to the myriad factual circumstances and legal contexts which it can arise. The D.C. Circuit's reliance on Golden State Bottling, ignores the distinguishing facts and law of this case in light of Burns. In Golden State this Court required a successor to reinstate a discharged employee of its predecessor. It noted however, that no important policy consideration, as was evident in Burns, was evident in that case. Burns established that no successor is bound to its predecessor's contract terms after the date of its takeover. Thus, a successor with knowledge of a predecessor's unfair

labor practice of failing to honor a contract must, if at all, make good on that contract to the date of its takeover. Here, in derogation of this Court's holding, the successor was bound to the substantive terms of its predecessor's contract. This Court last dealt with a successor's liability for a predecessor's unfair labor practices in 1973.

STATEMENT OF THE CASE

In the underlying unfair labor practice proceeding, J.R.R. Realty Co., ("JRR"), was held to have improperly discharged the employees at an apartment building that it bought in April 1981. The NLRB issued its decision almost four years after the event, on January 28, 1985. That decision is reported at 273 NLRB 1523. The Second Circuit enforced the order at 785 F2d 46 and this Court denied certiorari 479 US 830.

Before the NLRB ("Board") issued its original order in the case a cooperative corporation, Holland House Tenant's Corp ("Holland House"), took over the building in June 1984. Holland House was, of course, not a party to the underlying NLRB proceeding. It is composed of tenant "shareholders" who own the building. There is no allegation that Holland House is

anything but a bona fide purchaser of the building. Pursuant to the extant orders, all of the discharged employees were offered reinstatement. All refused it before Holland House took over the building. Thus, these employees had no further interest in the building. In accordance with the Board's claim, and while preserving its legal position, Holland House sent checks for the funds on two occasions. They were told that the amount ordered by the Board was insufficient to buy coverage and when a full current rate was sent, it was rejected by the union because it claimed that it could not take money from Holland House since it had no contract with Holland House and receipt of the monies would violate Section 302 of the LMRA.

In the "compliance" phase of the case, the proceeding here under

review, the Board named Holland House as a successor to JRR. Holland House admitted, in its answer, that it was aware of the existence of the proceeding against JRR when it bought the building. The Board, the discriminatees and the replacement employees fully settled their claims against the employer for wages, damages and loss benefits, i.e., the element of "make-whole" relief. The only claim left to be litigated was whether contributions to the various union welfare and pension funds, for a constant complement of six unnamed bodies, had to be made. At the hearing, the General Counsel sought contributions for the entire period from 1981 through 1989. She did not seek liquidated damages because she regarded them as a penalty and outside of the Board's authority. A member of the Board agreed. The Board, however, ordered

their payment.

Most significant however about the Generals Counsel's case is the failure and refusal to prove any losses to any employees that would render these payments anything but a windfall to the union. No proof of fund payments for health claims of employees was presented. No actuarial evidence was introduced. In fact the evidence solicited by the JRR and Holland House showed that no claims were made or even existed.

The Board's Order under review, reported at 301 NLRB #67 (January 31, 1991), requires increasing levels of contributions for the entire period occurring both before and after the Holland House purchase date and assessed liquidated damages and interest. It required payments for a constant level of six employees

notwithstanding that there were not six employees employed at any time since 1981. It does not give credit for the proffered payments to even toll the liquidated damages and interest. The D.C. Circuit Court of Appeals, in an unpublished order, enforced the Board's order in full. (Docket #91-1159, February 21, 1992)

POINT I

THE BOARD'S REMEDIAL AUTHORITY DOES NOT EXTEND TO IMPOSING PENALTIES OR DOLING OUT WINDFALLS EVEN WHERE AN UNFAIR LABOR PRACTICE IS FOUND

There is a clear dichotomy in the Board's own case law regarding whether a windfall remedy is within the Board's authority. In a long line of cases the Board has held that even where there is a failure to honor a contract and a party is directed to comply with it and make payment to union benefits

funds, there must be a showing of actual loss to employees, or payments made by the funds to cover various health expenses for employees, before contributions can be sought. Colletti Color, 204 NLRB 647 (1973); Service Roofing Co., 200 NLRB 1015; Hasset Maintenance Corp., 260 NLRB 1211 (1982); Napne's Olive Knoll Farms, 223 NLRB 260 (1976); Crest Beverage, 231 NLRB 116 (1977); Turnbull Enterprises, 259 NLRB 934 (1982); Markland Lake Manor, 263 NLRB 1062 (1982); Schmit Tiago Const., 286 NLRB 342 (1987); Southland Dodge, 232 NLRB 878 (1977).

As the Second Circuit Court of Appeals observed, in Manhattan Eye, Ear and Throat Hospital vs. NLRB, 942 F2d 151 (August 15, 1991), "[a]t the same time the Board was developing another line of cases requiring employers who unilaterally discontinued contributions

to union sponsored benefit funds to reinstate the status quo ante by making all retroactive payments to those plans..." The court cited numerous cases of the Board for that position. (It is noteworthy that whereas in all the aforementioned cases there was, as part of the original underlying proceeding, a specific order to make payments to the funds, the instant original order and injunction does not directly order payments to the Funds. See original Order 273 NLRB 1523.) The Board, in the words of the court, for "the first time...acknowledged the inconstancy of its two lines of cases."

That decision of the Second Circuit clearly conflicts with the decision of the D.C. Circuit in this case.

In that case, the Second Circuit held that windfall payments to a Union

Welfare Fund "is not a remedy that is consistent with the Act's purposes. See Republic Steel Corp, 311 U.S. at 10." That court also noted that where, as herein, such "...a windfall for the Fund...fails to benefit the employees, a penalty to the [Employer]..." is improperly imposed. That court also refused to presume losses to the Fund without any supporting evidence since such an order would be "speculative" rather than "actual" as demanded by this Court in Sure Tan Inc, 467 U.S. 883 at 900 (1984). The court also noted that this Court in Republic Steel vs. NLRB, 311 U.S. 7 at 12 held that:

> The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees.

In this proceeding there was no actuarial evidence presented to show "actual", rather than "speculative", damages. No employee testified to any loses sustained. The Funds produced no witnesses to show that they paid any claims. In fact, it is clear that there never were more than four employees employed since 1981. Thus, the payment for six employees is inexplicable especially when all claims of the employees, both the original ones and their replacements, have been fully settled. Accordingly, only the Funds would benefit from this unexpected windfall since no losses exist to anyone. The D.C. Circuit, without a shred of evidence, presumed that "actuarially" such payments were necessary. As noted, the discharged employees had no further economic interest in the Funds future since they

had refused reinstatement.

POINT II

HOLLAND HOUSE CANNOT BE LIABLE FOR FUND CONTRIBUTIONS AFTER THE DATE OF ITS TAKEOVER

In Burns Security vs. NLRB, 406 U.S. 272 (1972) this Court established that a successor employer is not bound by its predecessor's labor contract. Burns supra at 284. Indeed, a successor can set initial terms of employment without consultation with a union. Id at 294-295. This Court noted that there could not be a violation of instituting a unilateral change in terms of employment since in a successorship setting, there could not be a change from the successor's terms. Holland House would therefore not be bound by its predecessor's contract terms.

The D.C. Circuit in this case, relied on this Court's decision in

Golden State Bottling vs. NLRB, 414 U.S. 148 (1973) to require Holland House to abide by the terms of JRR's "contract" because Holland House took title with knowledge that there was, in the words of the D.C. Circuit, "entanglement" with the NLRB. This Court has made clear that in dealing with "...the difficult "successorship" question..." this Court's rulings are "...properly cautious and narrow". Moreover, this Court has noted that "[p]articularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate" Howard Johnson vs. Hotel Restaurant Employees 417 U.S. 249 (1974). Indeed, this Court held that a

"...new employer, in other words, may be a successor for some purposes and not for others." Id at fn 9.

In this case there was no extant Board order against JRR when Holland House purchased the building. In fact, the only order was a state court judgment finding that there was no duty to arbitrate disputes under JRR's predecessor's contract. See Babad vs. NLRB, 785 F2d 46, at footnotes 3 and 4. It is, therefore, questionable whether Holland House was purchasing the building with knowledge of its predecessor's unfair labor practice.

More importantly this Court in Golden State, supra, noted that it was "...in no way qualify[ing] the Burn's holdings..." in finding that a successor must remedy a predecessor's unfair labor practice where they purchase with knowledge of the predecessor's being

found guilty of an unfair labor practice. Indeed the Court stated that in Golden State, where a discharge was in issue, "unlike Burns, where an important labor policy opposed saddling the successor employer with the obligations of the collective bargaining agreement, there is no underlying congressional policy..." in a discharge case.

The Board, on the same day that it issued the decision here on review, also decided Sea Bay Manor Home, 301 NLRB #71. The Board there discussed this Court's Burns and Golden State decisions and noted that in Golden State,

> The Court, however, was careful to preserve its holding in Burns in stating: "We in no way qualify the Burns holdings...[U]nlike Burns, where an important labor policy opposed saddling the successor

> employer with the obligations of the collective-bargaining agreement, there is no underlying congressional policy here militating against the imposition of liability."

In Sea Bay Manor, the Board refused to require a successor to honor the terms of the predecessor's abrogated contract. It imposed no liability on the successor after the date of its takeover. The Board cites Pacific Aggragates at footnote 7 of the decision herein on review. This of course is similar to its holding in Pacific Aggragates, supra where make-whole relief to the Funds, ordered in the Board's original decision, was cut off at the point of the successor's takeover. Sea Bay Manor cites to Martin J. Barry Co., 278 NLRB 393 (1986) and notes that in Martin J. Barry:

> The Board held that the predecessor's collective-bargaining agreement could not be

> imposed on the successor for periods subsequent to the date it began operations, but that the successor was liable to make employees whole for losses they suffered between the date the predecessor unlawfully refused to honor its contract and the date it ceased operations.

Sea Bay Manor, supra at footnote 12. It should be remarked that as in Sea Bay Manor, Id

> In this regard the Respondent was not a party to the underlying proceeding and the notice of hearing here did not allege the Respondent's refusal to bargain. Thus, the remedy in this supplemental proceeding more appropriately is limited to ordering affirmative action necessary to remedy the predecessor's unfair labor practices consistent with the Respondent's status as a successor. We will modify the recommended order accordingly.

Inexplicably, and in direct derogation of this Court's holdings, the Board and D.C. Circuit imposed on Holland House

the contract terms of JRR including a contractual duty to pay onerous liquidated damages and interest. Yet Holland House's attempts to pay the benefit Funds were rebuffed because they had no contract with the Union.

CONCLUSION

The Court should grant certiorari to determine these two important questions of Federal Labor Law.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1159 September Term, 1991

J.R.R. REALTY CO. and

HOLLAND HOUSE TENANTS CORP.

Petitioner

— v. —

NATIONAL LABOR RELATIONS BOARD,

Respondent

ON PETITION FOR REVIEW AND
CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Before:

MIKVA, *Chief Judge;*

RUTH B. GINSBURG
and RANDOLPH, *Circuit Judges*

JUDGEMENT

This Case was considered on petition for review and cross application for enforcement of an order of the National Labor Relations Board, and on the briefs filed by the parties and arguments by counsel. The arguments have been accorded full consideration by the court and occasion no need for a published opinion. *See* D.C. Cir. Rule 14(c). For the reasons stated in the accompanying memorandum, it is

ORDERED and ADJUDGED that the petition for review be denied and that the Board's supplemental order, reported at 301 NLRB No. 67 (January 31, 1991), be enforced.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam
For the Court

Constance L. Dupre

Clerk

J.R.R. Realty and Holland House Tenants Corp v. NLRB, No. 91-1159

MEMORANDUM

This is a backpay proceeding, supplementing the National Labor Relations Board's decision and order in the underlying unfair labor practice case, *Chaim Babad, Bernard Steinmetz & Emanuel Steinmetz*, 273 NLRB 1523 (January 22, 1985). The Board found that in 1981, J.R.R. Realty fired all six of its union apartment building employees in violation of the National Labor Relations Act. That decision was enforced in full by the United States Court of Appeals for the Second Circuit. NLRB v. Babad, 785 F.2d 46 (2d Cir. 1986). The Board then ordered J.R.R. Realty and its successor, Holland House Tenants Corporation, to compensate the discharged employees, the replacement employees, and the Union's health and pension fund. *Chaim Babad, Bernard Steinmetz & Emanuel Steinmetz & Holland House Tenants Corp. & Local 32B-32J, AFL-CIO*, 301 NLRB No. 67 (January 31, 1991). The Companies challenge the remedial order.

"The Board has broad authority to devise remedies which will 'effectuate the policies' of the National Labor Relations Act., and its 'choice of remedies is entitled to a high degree of deference by a reviewing court.'" *St. Francis's Fed'n of Nurses & Health Professionals* v. NLRB, 729 F.2d 844, 849 (D.C. Cir. 1984) (citation omitted).

In light of our traditional deference to the Board's remedial orders, we reject the Companies' argument that the Board abused its discretion when it ordered the Companies to make the funds whole. The Board's order in the underlying unfair labor practice case clearly requires J.R.R. Realty and its successors to "honor and give retroactive effect from April 1, 1981, to the terms and conditions of the collective bargaining contract with the

Union, including payment of wages and benefits *as prescribed*" in the contract. 273 NLRB at 1529 (emphasis added). The lost benefits are to be paid "in accordance with the terms and conditions of employment set forth in the contract," which expressly required J.R.R. Realty to contribute to the Union's health and pension funds on behalf of unit employees. *Id.* at 1528-29.

Since the Board's original order requires the Companies to honor the 1981 contract, the board did not abuse its discretion when it ordered them to make the union whole for lost pension and health benefits on behalf of the six employees. Under the Board's solution, the companies do not profit from their wrongdoing, and the fund is maintained actuarially. *See Stone Boat Yard v. NLRB,* 715 F.2d 441, 446 (9th Cir. 1983). The Companies also complain that they should be liable for the benefit only to the extent that claims were actually made against the fund. Even if the union fund meets "the present needs of its employees, the diversion of contributions from the union funds undercut the ability of those funds to provide for future needs." *Id.*

The companies also challenge the Board's interpretation of the underlying contract, which they correctly argue does not deserve deference. "We would risk the development of conflicting principles were we to defer to the board in its interpretation of the contract, as distinct from its devising a remedy for the unfair labor practice that follows from a breach of contract." See *Litton Fin. Printing Div. v. NLRB,* 111 S. Ct. 2215, 2223 (1991). The contract provides that contributions shall be increased annually as provided "in the 1981 Commercial Building Agreement (or its successor)." The Companies would interpret the language of the contract to mean that they are required to pay only the increases contained in the 1981 Commercial Building Agreement. But this would make the subsequent phrase "(or its successor)" mean-

ingless. *See Retail Clerks Int's Ass'n v. NLRB*, 510 F.2d 802, 806 n.15 (D.C. Cir. 1975) ("It is a settled rule of contract interpretation that contract language should not be interpreted to render the contract promise illusory or meaningless."). Even under *de novo* review, we uphold the Board's interpretation.

The Companies have three other broad arguments, all which we reject. First, Holland House argues that even if J.R.R. Realty is obliged to comply with the board's order, Holland House is not required to comply. But Holland House is clearly the successor to J.R.R., and it admitted below that it took control with knowledge of J.R.R.'S entanglement with the NLRB. We hold, therefore, that it is liable. See Golden State bottling Co v. NLRB, 414 U.S. 168, 171 n.2 (1973) ("{O}ne who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.") (citation omitted).

Second, the Companies argue that they are not liable to the replacement employees; but we conclude that they have waived the argument by failing to raise it below. Section 10 (3) of the National Labor Relations Act, 29 U.S.C. 160(e), provides that "no objection that has not been urged before the Board...shall be considered by the court." This Court is therefore "without jurisdiction" to review the matter. *Woelke & Romero Framing, Inc. v. NLRB*, 456 u.s. 645, 665-66 (1982).

Third, the Companies contest the award of liquidated damages, arguing that the Board's order is not "mandated" because the bargaining agreement and the Declaration of Trust granted "sole and absolute discretion" for assessing liquidated damages to the fund's trustees. But the Board's order does not infringe on the

trustees' authority. On the contrary, the Board specifically left the decision about whether to award liquidated damages in the hands of the trustees.

Accordingly, we deny the petition for review and enforce the Board's supplemental order.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1159 September Term, 1991

JRR REALTY CO. and
HOLLAND HOUSE Tenants Corporation,

Petitioner

— v. —

NATIONAL LABOR RELATIONS BOARD,

Respondent

BEFORE:
MIKVA, Chief Judge; RUTH B. GINSBURG and
RANDOLPH, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing, filed April 1, 1992, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1159 September Term, 1991

JRR REALTY CO. and HOLLAND HOUSE
Tenants Corporation,

Petitioner

— v. —

NATIONAL LABOR RELATIONS BOARD,

Respondent

BEFORE:

MIKVA, Chief Judge; WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, Circuit Judges

ORDER

Petitioner's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1159 September Term, 1991

JRR REALTY CO. and HOLLAND HOUSE TENANTS CORPORATION,

Petitioner

— v. —

NATIONAL LABOR RELATIONS BOARD,

Respondent

ORDER

Upon consideration of petitioners' unopposed motion for stay of mandate, it is

ORDERED that the motion is granted and the Clerk is directed to withhold issuance of the court's mandate for a period of thirty days from the date of this order.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

301 NLRB No. 67

SCO
D—1738
Forest Hills, NY

UNITED STATES OF AMERICA BEFORE

THE NATIONAL LABOR RELATIONS BOARD

CHAIM BABAD, BERNARD STEINMETZ AND EMANUEL STEINMETZ, A CO-PARTNERSHIP d/b/a J.R.R. REALTY CO., AND HOLLAND HOUSE TENANTS CORPORATION, ADDITIONAL RESPONDENT

— and —

Cases 29—CA—8809
29—CA-8880

Local 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On January 10, 1990, Administrative Law Judge Steven Davis issued the attached supplemental decision. The General Counsel, the Union, and the Respondents filed exceptions and supporting briefs. The Union filed an answering brief to the Respondents' exceptions, and the Respondents filed a letter brief in response to the Union's and the General Counsel's exceptions. The Na-

tional Labor Relations Board has delegated its authority in this proceedings to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, [1] and conclusions[2] only to the extent consistent with this Supplemental Decision and Order.

1 The judge found that the Respondents were required to pay interest to the Local 32B health and pension funds in addition to liquidated damages. We note that interest is required pursuant to language in the Local 32B collective-bargaining agreement and the funds' trust agreement

The judge made an error in totaling the amount the Respondents owed the Local 32B pension fund. In light of our findings concerning the contributions owed to the health and pension funds, we have recalculated the total amounts due.

2 In agreeing with the judge that the parties' negotiations did not result in a good-faith impasse, we additionally rely on the Respondents' pervasive and widespread unremedied unfair labor practices including discharge of the entire bargaining unit and repudiation of the contract. In view of the breadth and severity of these violations, and the substantial period in which they remained unremedied, we will not permit the Respondents to "parlay an impasse resulting from (their) own misconduct... "Wayne's Dairy, 223 NLRB 260, 265 (1976). See also White Oak Coal Co., 295 NLRB No. 64, slip op. at 5 (June 15, 1989).

1. The Judge failed to find that the Respondents[3] must make contributions to Local 32B's pension fund on behalf of the discriminatees. The General Counsel excepts, contending that the Board's Order and the terms of Local 32B's collective-bargaining agreement require the Respondents to make contributions to Local 32B's pension fund on behalf of the discriminatees during their backpay periods.[4] We agree.

3 Holland House Tenants Corporation is an additional Respondent.

4 The General Counsel's compliance specification did not seek Local 32B health fund contributions on behalf of the discriminatees.

In the underlying unfair labor practice proceeding,[5] the Board ordered Respondent J.R.R. Realty Co. (J.R.R.)"(h)onor and give retroactive effect...to the terms and conditions of the collective-bargaining contract with the Union, including payment of wages and benefits as prescribed."[6] The Board also ordered the Respondent to offer reinstatement to the six discriminatees and make them whole for any loss of earnings and other benefits resulting from their discharge. The Local 32B collective-bargaining agreement requires the Respondent to make contributions to the pension fund on behalf of its employees.

5 273 NLRB 1523 (1985), enfd. 785 F.2d 46 (2d Cir. 1986).

6 273 NLRB at 1529.

Accordingly, we find, pursuant to the board's Order, that the Respondents must make payments to the Local 32B pension fund on behalf of the discriminatees as set forth in appendix G of the amended backpay specification.[7]

7. Relying primarily on **Coletti Color Prints**, 204 NLRB 647, 648 (1973), the Respondents deny any obligation to make contributions to the Local 32B pension and health funds. **Coletti** held that in the absence of proof of employee losses, the respnondent was not obligated to make unlawfully withheld fringe benefit fund payments. However, the Respondents do not cite the Board's subsequent adoption of administrative law judges' decisions in **Pacific Aggregates**, 231 NLRB 214, 221 — 222 (1977), and **Argano Electric Corp**., 248 NLRB 352, 360 — 361 (1980), which significantly limited the scope of **Coletti**. In these later cases, it was noted that 2 years after **Coletti** the Board decided **Stanwood Thriftmart**, 216 NLRB 852, 854 (1975), enf. denied on other grounds 541 F. 2d 796 (9th Cir. 1976), which held, seemingly inconsistently with **Coletti**, that the appropriate remedy for the unfair labor practice of discontinuing contributions to union welfare and trust funds is reinstrating the status quo ante, i.e., paying all past due welfare and pension contributions. Assuming that **Coletti** survived the later decision in **Stranwood Thriftmart**, the Board in **Pacific Aggregates** and **Argano Electric** limited **Coletti** to its specific facts, noting that **Colleti** involved a collective-bargaining agreement with a union which lost a Board election after the agreement expired and, further, involved school and medical insurance funds from which the employees could benefit only during the life of the contract which required such payments. As in **Pacific Aggregates** and **Argano Electric**, and in contrast to **Coletti**, the Union here continues to be the employees' bargaining representative and the unit employees have an interest in the continuance of the funds and their financial stability. Accordingly, for the reasons stated in **Pacific Aggregates** and **Argano Electric**, we find no merit in the Respondents' contention. See generally **Kraft Plumbing & Heating**, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

2. The judge found, and we agree, that replacement employees who were employed after January 1, 1989,[8] are entitled to Local 32B contractual wages and benefits. The General Counsel excepts to the judge's failure to grant replacement employee Anthony Falcone Local 32B contractual wages and benefits for his period of employment after January 1, 1989.[9] The General Counsel argues that the backpay specification shows Falcone's date of hire as February 4, 1984, and does not show any date of termination because Falcone was still employed as of the date of the hearing. According to the General Counsel, the judge assumed that Falcone's employment had terminated prior to the hearing because he did not testify at the hearing, unlike the other replacement employees.[10] We agree with the General Counsel that replacement employee Anthony Falcone, whom the Respondents do not dispute was employed by the Respondents at the time of the hearing, should receive

8 Backpay claims for replacement employees for periods prior to January 1, 1989, had been resolved by the parties prior to the hearing.

9 In his supplemental decision, the judge listed Anthony Falcone as a replacement employee and stated that there was no testimony concerning when he left the Respondents' employ.

10 The General Counsel argues that the other replacement employees testified because the Respondents had questioned their days and hours of employment prior to January 1, 1989. The General Counsel contends that Falcone's testimony was unnecessary because the Respondents did not question Falcone's days and hours of employment prior to January 1, 1989.

Local 32B contractual wages and benefits for his period of employment after January 1, 1989.

3. We agree with the judge that the Respondents must make contributions to the Local 32B pension and health funds on behalf of the replacements. [11]We disagree, however, with the judge's finding that the Respondents should be required to pay only those increases provided for in the 1981 Commercial Building Agreement. Rather, we find that the Respondents must pay the increases up to and including the rates set forth in the 1984 Commercial Building Agreement.

11 In affirming the judge's finding that the Respondents be required to make contributions into these funds regarding "six positions," we find no merit in the Respondents' contention that this level of contributions is excessive to the extent that there were at any time no more than four replacements employed. The requirement that funding be maintained for six positions, as requested by the General Counsel, is warranted in order to ensure the actuarial soundness of the funds. We further note that to the extent that pension fund contributions are required for both the replacements and the original discriminatees, this increased level of funding is warranted due to the coverage of both groups of employees, in addition to the need to maintain the soundness of the pension fund.

The judge examined the parties' 1979 contract[12] and rejected the General Counsel's argument that the contract required the Respondents to pay contribution increases to those funds as set forth in succeeding commercial building agreements.[13]

The judge noted that the language of the 1979 contract contemplated that the increased contribution amounts were to be raised only as set forth in the 1981 Commercial Building Agreement or its successor. The judge accordingly found that the 1979 contract's reference to the 1981 Commercial Building Agreement indicated that the Respondents had agreed that on the effective date of 1981 Commercial Building Agreement, the Respondents became responsible for the increased amounts of fund contributions set forth in the 1981 Commercial Building Agreement. However, the judge further found that the contract's usage of the disjunctive "or" in reference to any successor agreement to the 1981 Com-

12 Art. X, sec. 40, par. (D)(2) of the parties' collective-bargaining agreement states:
Any contributions and benefits required hereunder shall be increased by any amount in the same manner as contributions and benefits may be increased in the 1981 Commercial Building Agreement (or its successor)between the Union and the RAB (Realty Advisory Board) and if service fees are required to be paid, the same fees shall be required to be paid hereunder.
Art. VI, par. 1 (d) of the parties' 1979 collective-bargaining agreement also states:
Upon expiration date of this agreement... (it) shall thereafter continue in full force and effect for an extended period until a successor agreement shall have been executed. During the extended period, all terms and conditions hereof shall be in effect.

13 The commercial building agreements are collective-bargaining contracts which ran from January 1981 through December 1983; January 1984 through December 1986; and January 1987 through December 1989.

mercial Building Agreement precluded the Respondent from being obligated to provide any additional increases as set forth in such successor agreements. Such an interpretation, the judge found, would only have been justified had the phrase used been "the 1981 Commercial Building Agreement (**and** its successor)."

The Union excepts, arguing that the Respondents should be required to pay the increases contained in all the commercial building agreements past 1981 and the judge's decision to limit fund contributions to 1981 rates is not supported by the facts. The Union contends that Local 32B's collective-bargaining agreement requires contributions to the pension and health funds and that these contributions must be increased to match any increases required under the 1981 Commercial Building Agreement or its successors. The Union maintains that language in the Local 32B contract was intended to mean that the contract continue in full force and effect after its "technical expiration." The Union argues that the Local 32B contract provides that any increases in the pension and health rates are to be passed along to contributing employers regardless of the effective date of those increases.[14]

14 The Union additionally argues that even if the judge was correct in interpreting the 1979 contract to mean that the Respondents are not required to pay the increased costs of the health and pension coverage, the Board should still require the respondents to pay these increased costs. The Union notes that part of the Board's mandate is to "make whole" those adversely affected by unfair labor practices. The Union argues that if the judge's decision stands in this matter, the health and pension funds would be obligated to provide the Respondents' employees with benefits even though the Respondents are not required to pay the corresponding increased costs of the benefit. Therefore, the Union contends that the Respondents should be obligated to make the employees whole by making all contribution increases to the health and pension fund for all periods from 1981 to the present.

We agree with the Union that the Respondents' obligation to make fund contributions should not be limited to the rates in effect in 1981. We do not agree, however, with the Union's contention that the Respondents should be required to pay the increases contained in all the commercial building agreements past 1981. Instead, we find that the Respondents must pay the increases up to and including the rates set forth in the 1984 Commercial Building Agreement.

The 1979 Local 32B contract provides that the employer must increase contributions in the same manner as contributions are increased in the "1981 Commercial Building Agreement (or its successor)." In interpreting the language of the 1979 contract, the judge failed to adequately address the "or its successor" language. We conclude, based on the language of the contract, that the parties intended that the employer make fund contributions pursuant to the 1981 Commercial Building Agreement during its terms and thereafter make the fund contributions required by its immediate successor, the 1984 Commercial Building Agreement. The judge's construction of the phrase "(or its successor)" deprives it of any practical significance.

We reject the Union's argument that the language of the 1979 Local 32B contract requires the Respondents to pay the increases contained in all commercial building agreements past 1981. Such an interpretation of the parties' 1979 contract would require a finding that the contract obligated the employer to increase fund contributions to the 1981 Commercial Building Agreement or its successors. As that interpretation goes beyond the clear meaning of the contractual language at issue here which clearly limited the parties' obligation to a single successor contract, requiring Respondents to apply the terms of more than one successor would amount to making a new contract for the parties and would violate

the Supreme Court's holding in **H. K. Porter v. NLRB**, 397 U.S. 99 (1970), that the Board has no authority to compel agreement as to any substantive provision in a collective-bargaining contract.[15] Accordingly, we have recalculated the amounts due to the health and pension funds and the corresponding liquidated damages[16] owed by the Respondents below.

Contributions Due to the Pension and Health Funds

Concerning the rates of contributions to the health fund, the 1981 Commercial Building Agreement provides that effective January 1, 1981, the employer shall contribute to the fund $660 per year per employee. That contract further states that effective January 1, 1982, the employer shall contribute $712 per year per employee, and effective January 1, 1983, the employer shall contribute $816 per year per employee. The 1984 Commercial

15 We find no merit in the Union's contention that, as part of a make-whole remedy, the Respondents should be required to make contribution increases to which they did not agree.

16 We adopt the judge's finding that language in the Local 32B collective-bargaining agreement and the funds' trust agreement allow for the payment of liquidated damages to the funds. We further note that, according to the Local 32B contract, the funds' trustees may impose liquidated damages in their discretion. We therefore find that if the funds' trustees in their discretion decide not to impose liquidated damages, we will not require the respondents to pay these damages.
Unlike his colleagues, Member Oviatt would not award the funds liquidated damages in this case. Contrary to the cases on which the judge relies, Member Oviatt's view is that liquidated damages are neither mandated there under the terms of the applicable collective-bargaining agreement nor the trust agreements, nor is there affirmative record evidence that the trustees exercised their "sole and absolute discretion" to impose this penalty on the Respondents. In these circumstances, Member Oviatt finds the imposition of liquidated damages unwarranted.

Building Agreement provides that effective January 1, 1984, the employer shall contribute $1540 per year for each employee and that effective January 1, 1985, the employer contribution to the fund shall be $1693 per year for each employee.

Concerning the rates of contributions to the pension fund, the 1981 Commercial Building Agreement provides that effective January 1, 1981, the employer shall contribute to the fund $11 per week per employee. The contract further states that effective January 1, 1982, the employer shall contribute $12 per week per employee. The 1984 Commercial Building Agreement provides that effective January 1, 1985, the employer shall contribute to the fund $13.95 per week per employee. The contract further states that effective January 1, 1986, the employer shall contribute $15.55 per week per employee.

Regarding the amounts of liquidated damages to be paid to the Union's funds, the health and pension funds trust agreements provide that if contributions are more than 50 days late, a charge of 2.5 percent is applied

to the unpaid principal. that charge is retroactive to the first date the contribution was due. This formula has been used to compute the liquidated damages below.

Year	Qtr.	H.F. Cont.	H.F.L.D.	P.F. Cont.	P.F.L.D.[17]	Percent
1981	2	$990.00[18]	$2301.75	$858.00[19]	$1,994.85	232.5
	3	990.00	2,227.50	858.00	1930.50	225.
	4	990.00	2,153.25	858.00	1,866.15	217.5

17 These figures constitute contributions for six positions. The abbreviations are as follows:
H.F. Cont.—Health fund contributions
L.D.—Liquidated damages
P.F. Cont.—Pension fund contributions

18 The 1981 Health Fund Contributions are computed as follows:
The 1981 Commercial Building Agreement requires contributions of $660 per year per employee, effective January 1, 1981. The quarterly amount is $165 per employee. $165 times six positions equals $990.

19 The 1981 Pension Fund Contributions are computed as follows:
The 1981 Commercial Building Agreement requires contributions of $11 per week per employee effective January 1, 1981. $11 per week times 6 positions times 13 weeks per quarter equals $858.

1982	1	1,068.00[20]	2,242.80	936.00[21]	1,965.60	210.
	2	1,068.00	2,162.70	936.00	1,895.40	202.5
	3	1,068.00	2,082.60	936.00	1,825.20	195.
	4	1,068.00	1,997.16	936.00	1,755.00	187.5
1983	1	1,224.00[22]	2,203.20	936.00	1,684.80	180.
	2	1,224.00	2,111.40	936.00	1,614.60	172.5
	3	1,224.00	2,019.60	936.00	1,544.40	165.
	4	1,224.00	1,927.80	936.00	1,474.20	157.5
1984	1	2,310.00[23]	3,465.00	936.00	1404.00	150.
	2	2,310.00	3,291.75	936.00	1,333.80	142.5
	3	2,310.00	3,118.50	936.00	1263.60	135.
	4	2,310.00	2945.25	936.00	1,193.40	127.5
1985	1	2,539.50[24]	3,047.40	1,088.10[25]	1,305.72	120.
	2	2,539.50	2,856.93	1,088.10	1,224.11	112.5
	3	2,539.50	2,666.47	1,088.10	1,142.50	105.
	4	2,539.50	2,476.01	1,088.10	1,060.89	97.5
1986	1	2,539.50	2,285.55	1,212.90[26]	1,091.61	90.
	2	2,539.50	2,095.08	1,212.90	1,000.64	82.5
	3	2,539.50	1,904.62	1,212.90	909.67	75.
	4	2,539.50	1,714.16	1,212.90	818.70	67.5

20 The health fund contributions were increased to $712 effective January 1, 1982.

21 The pension fund contributions were increased to $12 effective January 1, 1982.

22 The health fund contributions were increased to $816 effective January 1, 1983

23 The health fund contributions were increased to $1540 effective January 1, 1984.

24 The health fund contributions were increased to $1693 effective January 1, 1985.

25 The pension fund contributions were increased to $13.95 effective January 1, 1985.

26 The pension fund contributions were increased to $15.55 effective January 1, 1986.

1987	1	2,539.50	1,523.70	1,212.90	727.74	60.
	2	2,539.50	1,333.23	1,212.90	636.77	52.5
	3	2,539.50	1,142.77	1,212.90	545.80	45.
	4	2,539.50	952.31	1,212.90	454.83	37.5
1988	1	2,539.50	761.85	1,212.90	363.87	30.
	2	2,539.50	571.38	1,212.90	272.90	22.5
	3	2,539.50	380.92	1,212.90	181.93	15.
	4	2,539.50	190.46	1,212.90	90.96	7.5
		$62,010.00	$60,438.94	$32,713.20	$36.574.14	

ORDER

The National Labor Relations Board orders that the Respondents, Chaim Babad, Bernard Steinmetz and Emanuel Steinmetz, a co-partnership d/b/a J.R.R. Realty Co., and Holland House Tenants Corporation, Additional Respondent, Forest Hills, New York, their officers, agents, successors, and assigns, shall

1. Make contributions to Local 32B-32J's pension fund on behalf of the discriminatees as set forth in appendix G of the amended backpay specification.

2. Make whole each of the employees who were employed on and after April 1, 1981, including, but not limited to, Anthony Falcone, Perter Berisha, Albert Gordon, and Colin Wayneschloss, at the building located at 73-37 Austin Street, Forest Hills, New York, now known as Holland House, by paying such employees (called replacement employees) such sums of money plus interest[27] which they are entitled to for wages, holidays, vacation, birthdays, and sickness benefits, as set forth in the

27 Interest shall be computed pursuant to **New Horizons for the Retarded**, 283 NLRB (1987).

judge's supplemental decision, for the period after January 1, 1989.

3. Pay to the local 32B-32J pension fund the sum of $69,287.34 plus interest which represents the amount owed from April 1, 1981, to December 31, 1988. Pay to the local 32-B32J health fund the sum of $122,448.94 plus interest which represents the amount owed from April 1, 1981, to December 31, 1988.

Dated, Washington, D.C. January 31, 1991

James M. Stephens, *Chairman*

Mary Miller Cracraft, *Member*

Clifford R. Oviatt, Jr., *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

JD (NY) — 122 — 89
Forest Hills, NY

UNITED STATES OF AMERICA BEFORE
THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

CHAIM BABAD, BERNARD STEINMETZ AND EMANUEL STEINMETZ, A CO-PARTNERSHIP d/b/a J.R.R. REALTY CO., AND HOLLAND HOUSE TENANTS CORPORATION, ADDITIONAL RESPONDENT.

— and — Cases Nos. 29-CA—8809
29-Ca-8880

LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Kathleen M. Troy, Esq., Brooklyn, NY *for the General Counsel.*

Ira A. Sturm, Esq. (Manning, Raab, Dealy & Sturm, Esqs.), New York, NY, *for the Union.*

Morris Tuchman, Esq., New York, NY, *for the Respondents.*

'SUPPLEMENTAL DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: On January 22, 1985, the National Labor Relations Board (Board) issued its decision and Order in the above cases, which was published at 273 NLRB 1523, which directed Chaim Babad, Bernard Steinmetz and Emanuel Steinmetz, a co-partnership d/b/a J.R.R. Realty co., (J.R.R.) and its officers, agents, successors and assigns, to, **inter alia**:

> (a) Honor and give retroactive effect from April 1, 1981, to the terms and conditions of the collective-bargaining contract with Local 32B-32J, Service Employees International Union, AFL-CIO (Union), including payment of wages and benefits as prescribed; and
>
> (b) Offer reinstatement to six named discriminatees, Ezekiel Correa, Gilberto Concepcion, Lorenzo Cruz, Charles Darmendo, Curtis Phillip and Hugh Robertson, and make them whole for any loss of earnings and other benefits resulting from their discharge.

On March 4, 1986, the United States Court of Appeals for the Second Circuit entered its Judgment enforcing in full the Decision and Order of the Board, published at 785 F.2d 46. On October 6, 1986, the United States Supreme Court denied Respondents' petition for a writ of certiorari.

A controversy arose over the amount of packpay due to the 6 discriminatees, and the amounts if any, owed to the replacement employees, and to certain fringe benefit funds on their behalf. Whereupon, the Regional Director for Region 29 issued a Backpay Specification and Notice of Hearing on May 28, 1987, against the above-named Respondents, and an Amended Backpay

Specification and Notice of Hearing on July 5, 1988, against the above-named Respondents and Holland House Tenants Corporation, Additional Respondent, (Respondents) which set forth the amounts of backpay alleged to be due the discriminatees, the replacement employees and the amounts allegedly owed to the fringe benefit funds on their behalf.[1]

Thereafter, Respondents filed an answer in which they denied certain allegations of Specification and made certain affirmative defenses.

A hearing was held before me in Brooklyn, New York on October 11, 26, 27, November 16 and December 6, 1988, and was closed by Order on December 22, 1988. Following the hearing, briefs were received from all parties.

On April 7, 1989, counsel for General Counsel filed a Motion which stated that the parties have settled certain claims set forth in the Amended Backpay Specification as follows:

> The parties' settlement resolves the backpay claims of discriminatees and their replacements alleged in Amended Appendices A through F, and Appendices H through Q.

The Motion further stated that the parties' settlement does not resolve the:

1 The amended Backpay Specification was further amended at the hearing to include, as relevant here, in General Counsel's Exhibit 4, an amendment to Appendix G, the computation of the contributions to the Building Service 32B-32J Pension Fund.

(a) claims of the replacement employees for wages, holidays, vacation, birthdays or sick pay for the period after January 1, 1989.

(b) claims for contributions owed to the Building Service Local 32B-32J, Pension and Health Funds on behalf of the discriminatees and their replacements as alleged in Appendix G, and Appendices R and S of the Amended Backpay Specification.[2]

(c) claim of employee Colin Wayneschloss, or the claims of any employees hired after January 1, 1989.

General Counsel accordingly moved that I approve her request for withdrawal of Amended Appendices A through F, and Appendices H through Q of the Amended Backpay Specification.

No opposition has been filed to General Counsel's Motion, and it is accordingly granted.

This Supplemental Decision is based on the entire record including the briefs and my observation of the demeanor of the witnesses.[3]

2 The Motion did not mention Appendix S. However, it is clear, that inasmuch as the Motion did mention the Health Funds, which calculations are set forth in Appendix S, that Appendix S was intended to be included. Moreover, General counsel's brief, filed before the Motion, urges consideration of Appendix S.

3 The Union filed a Motion to Correct Transcript. The Motion was joined in by General Counsel. No opposition to it has been filed. The corrections to the transcript, as so moved, are granted, and they appear in the Appendix.

I. Background

In the underlying unfair labor practice proceeding, it was found that at the time that J.R.R. purchased the apartment building known as Holland House on March 31, 1981, its 6 employees had been represented by the Union, which had a collective bargaining agreement with the predecessor of J.R.R. The contract was dated August 27, 1979 and was effective until April 20, 1982. J.R.R. discharged the 6 employees, refused to honor the collective bargaining agreement, hired replacements and reduced the number of employees in its work force.

The Board found that at the time that J.R.R. purchased the building, it had adopted the collective bargaining contract with the Union, and was obligated to honor it, and accordingly ordered J.R.R. to honor and give retroactive effect from April 1, 1981 to the terms and conditions of that agreement, including the payment of wages and benefits as prescribed. The Court of Appeals held that "J.R.R., having assumed its predecessor's labor contract, was bound to abide by the terms of that contract."

Respondents admitted the following, in relevant part, by virtue of their answer to the Amended Backpay Specification:

> (a) From March 31, 1981 to about June 15, 1984, Chaim Babad, Bernard Steinmetz and Emanuel Steinmetz, a co-partnership d/b/a J.R.R. Realty Co., had maintained its principal office and place of business at 284 Hewes Street, Brooklyn, New York, where it was, and has been engaged in the ownership, rental and management of apartment units.
>
> (b) From on about June 15, 1984 to the present, Holland House Tenants Corporation, has maintained its principal office and place of busi-

ness at 284 Hewes Street, Brooklyn, New York, where it is, and has been engaged in the ownership, management and sales of apartment units.

(c) Within the knowledge of J.R.R. and Holland House, Respondent Holland House in about May, 1984, acquired from J.R.R. the land and building at issue herein, and since that date has continued to operate the business of J.R.R. in basically unchanged form.[4]

(d) Prior to the acquisition by Holland House of the building herein, Holland House was on notice of the potential liability of J.R.R. in these Board cases, through Chaim Babad who was a partner in J.R.R. and who also is the majority shareholder in Holland House.

(e) Holland House has continued the employing entity with notice of the potential liability of J.R.R. to remedy its unfair labor practices, and is a successor of J.R.R.

The Current Dispute

There has been an exchange of correspondence and 2 meetings between the parties which sets the stage for this hearing and the arguments of the parties. Accordingly, they have been set forth here, in relevant part.

On April 7, 1986, Union Attorney Ira Strum wrote to Chaim Babad, a principal of J.R.R. Realty, requesting

4 The date that Holland House acquired the building was alleged as about May 15, 1984. That date has not been admitted by Respondents, but they concede in their brief that Holland House commenced operations in June, 1984.

that he "immediately institute all the terms and conditions of employment as set forth in the collective bargaining agreement under which the (Second Circuit Court of Appeals) has found you to be obligated." Sturm also requested certain information regarding the wages and benefits to employees.

On November 14, 1986, Sturm wrote to Morris Tuchman, Respondent's attorney, demanding that "all terms of employment as contained in the 1981 Independent Apartment House Agreement be adhered to prospectively for all current unit employees. Thus it is demanded that all wages be paid, benefits applied and contributions to the welfare and pension fund be paid on behalf of current employees. (Past monies owed can be dealt with either through mutual agreement, arbitration or through the NLRB's compliance machinery.)..." Strum asked that Tuchman contact him so that "arrangements can be made to restore the status quo and commence negotiations."

On January 23, 1987, Sturm, having been told by Tuchman to write to Babad directly, sent him a letter requesting that J.R.R. "comply prospectively with the benefits, and wage schedule of the 1979 Independent Apartment House Agreement, which you assumed," and also requested certain information.

On March 11, 1987, Tuchman wrote to Sturm, stating that Babad is "prepared to meet and negotiate with the (Union) on the terms of a collective bargaining agreement."

On March 13, 1987, Sturm wrote to Tuchman, confirming a meeting to be held on March 25. Sturm wrote that the Union "is entitled to a restoration of the status quo as had been in existence prior to the unlawful breach of contract by your client." Sturm stated that J.R.R. must restore the complement of employees to 6, who

"must be paid at the last contract rate in effect and each must have fund benefits paid on his behalf for all periods retroactive to the breach.... Also, any current or replacement employees must likewise be made whole by payment to them in the difference in the contract rates and what they were paid, as well as any benefits."

On March 17, Tuchman wrote to Sturm, stating that the building was now owned by a cooperative corporation, and that J.R.R. Realty no longer owns it. Tuchman further advised that he believed that the corporation is substantially liable for remedying the unfair labor practices of its predecessor, and proposed leaving such compliance issues regarding the successor to the Board. He also noted that the corporation is prepared to pay the rates under the old agreement and to commence fund payments for the employees.

On March 25, 1987, a one hour meeting was held. Present were Sturm, Tuchman, Babad and others. Sturm requested the information that he had previously asked for and which he had not yet received. Some of the information was supplied at that time.

Sturm stated that the purpose of the meeting was not to negotiate, but rather to discuss the return of the conditions as they had existed prior to the commission of the unfair labor practices — a return to the status quo ante — . It was Sturm's view that once conditions had been restored, negotiations would then begin.

At the meeting Sturm objected to the fact that only 4 employees were working at the building whereas prior to the commission of the unfair labor practices, 6 had been employed. As to the 2 current employees, Sturm noted that one was working 4 days per week and the other in excess of 40 hours per week, which changes were made unilaterally, in violation of the contract. Babad sought to explain those changes, but Sturm insisted that the status

quo must be restored before any changes were made. The meeting ended when Sturm requested that Respondent notify him when it complied with the contract and remedied the unfair labor practices.

The following day, Tuchman sent a letter to Regional Director Alvin Blyer in which he advised the Director that Holland House would immediately implement the terms of the 1981 collective bargaining agreement, and pay the wages and benefits provided in that contract. He further noted that in restoring the 1981 employee complement at the 1981 rates the current workers will lose overtime and additional pay. He also offered to bargain concerning future terms.

On March 31, Sturm wrote to Tuchman, advising that Holland House's reduction of the number of employees to 4 and its plan to reduce their pay violate the parties' contract. Sturm further noted the amounts allegedly due to the Health Fund and Pension Fund, from 1981 to date. It was Sturm's belief that Respondents' continue to be liable to the Funds.

On April 7, Tuchman replied to Sturm's letter. Tuchman denied that Holland House had any Fund liability beyond the 1982 expiration of the 1979 collective bargaining agreement.

Shortly thereafter, Tuchman offered to make Fund contributions for 4 employees at the 1982 rates. Sturm advised that those rates could not purchase the welfare package in 1987 since the rates had increased since 1982. Sturm told Tuchman that if Holland House sent the Funds at the 1982 rates, the Funds would not credit it for the current contribution amount owed. Rather, that money would be used to pay such sums owed retroactively from 1981, which according to Sturm was then about $166,766.

On April 9, Tuchman sent Sturm 2 checks payable to the Pension and Health Funds for the 4 current employees, for the period april 1, 1987 to June 30, 1987. The payments were made at the 1982, and not the current rates. Those sums were sent by Sturm to the Funds, with instructions that they be applied to the oldest amounts (the arrearages) owed, and not applied to current sums owed. Thereafter, Tuchman wrote to Sturm, requesting that the Union permit Respondents to provide health coverage to the current employees or that the sums sent be applied to the current workers.

On April 13, Sturm wrote to Tuchman, stating that the parties' 1979 contract's fund provisions continued in effect notwithstanding that contract's expiration in 1982.

On April 16, Tuchman wrote to Sturm, stating that it was his belief that Respondents are not responsible for increases in contributions after the contract expired.

The parties met on May 21, 1987 for 30 to 60 minutes. Present were Sturm, Tuchman, Babad and Peter Lichtenthal, a member of the Board of Directors of Holland House.

Sturm stated that he was asked to present proposals for a new contract. He replied that the Union was not obligated to bargain until Respondents' restore the conditions to that existing prior to the commission of the unfair labor practices. They discussed a prospective contract, and measures to remedy the past violations. Sturm offered Respondents 2 options: accept the current standard industry apartment house collective bargaining agreement or negotiate with the Union for a separate contract. Babad stated that he wished to negotiate a new contract, and the Union agreed. At that meeting, the Union made proposals for a new agreement.

The parties discussed the issue of medical coverage for the current employees. Babad stated that he

wanted to provide some medical coverage through the Union, but did not wish to purchase the entire Union plan, which was more extensive than he sought, nor did he wish to pay for the full plan. He asked Sturm if the Union would provide coverage at a lower cost. Sturm replied that Union's Welfare Fund has one plan, which is available at the current rate. He told Babad that Respondents could not purchase only part of the Fund's plan. Sturm refused to provide lesser coverage at a lower cost and suggested that Babad find his own insurance.

Respondents then proposed to accept the current standard apartment house contract with 2 modifications: (a) that no discharge be effective without the consent of the Union or a finding of an arbitrator that there had been just cause for the dismissal and (b) that the wages paid to the employees be less than that provided in the contract. Sturm rejected that proposal and the meeting ended.

Lichtenthal's version of the meeting is essentially similar to Sturm's. He stated that Sturm said, in effect, that he wanted the status quo restored before negotiations began, and that it was not fair for the Union to be forced to negotiate from a position of weakness. Lichtenthal stated that Sturm gave Respondents the choice of accepting the current, standard apartment house contract or negotiating a new contract. Lichtenthal stated that Babad would never agree to the current wage rates as set forth in the current apartment house agreement, and he (Lichtenthal) proposed that the wage rates be modified from the standard rates. According to Lichtenthal, Sturm said he would send Respondents a proposal concerning wages and benefits in about 1 week. Such a proposal was never received.

Tuchman asked that Respondents be permitted to implement medical coverage for the current workers, and Babad offered to buy current medical coverage from the Union at the 1981 contract rate. Lichtenthal did not recall

Sturms's reply, but he did recall Sturm saying that (a) medical coverage must be provided by the Union, and Respondents could not provide such coverage and (b) Respondents could do whatever they wished to provide coverage, if it believed that doing so would terminate their liability. These seemingly contradictory statements by Sturm, taken in context of his testimony, in fact establish that Sturm told Respondents that they could not purchase Union medical coverage at less than current contract rates, and that if they sought to provide medical coverage for their employees elsewhere they could do so.

Thereafter, settlement discussions took place. On July 27, Tuchman wrote to Sturm rejecting his settlement proposal. Tuchman further stated that he believed that a further meeting would be helpful "prior to an impasse being declared." Finally, Tuchman added that Respondents would begin making contributions at the current industry rate, effective July, 1987.

On September 23, 1987, Tuchman sent to Sturm 2 checks issued by Holland House payable to the Union's Health Fund and Pension Fund. Tuchman's letter stated that the payments were for the "J.R.R." employees at the current contract rates, for the period July 1, 1987 through September 30, 1987.

On October 16, Sturm wrote to Tuchman advising him that Section 302(c)(5) of the Taft Hartley Act prohibits a Fund from accepting contributions from an employer in the absence of a written agreement setting forth the basis for the contribution. Sturm further stated that inasmuch as no written agreement exists between the Union and Holland House such payments could not be accepted.

Positions of the Parties

General Counsel argues that Holland House, being the successor to J.R.R., which continued the employing entity with the notice of J.R.R.'S potential liability to remedy its unfair labor practices, is accordingly liable to remedy such violations. She further argues that the terms and conditions set forth in the 1979-1982 contract must be applied retroactively to the discharged and replacement employees.

General Counsel asserts, with respect to contributions to the Pension and Health Funds required by the contract, that the contract's provisions require that such payments be made, not just for the 1979-82 contract, but for the period from 1981 through the present. The Union joins in this argument, and in addition argues that liquidated damages for failure to make such payments must also be paid by Respondents for such time period.

Respondents argue that:

(a) the Board's Order required a make whole remedy for the discriminatees and not their replacements.

(b) they employed only 4 workers at any one time and therefore the Backpay Specification's claims for the 6 employees employed at the time of the finding of the violations is erroneous.

(c) General Counsel has not claimed that any of the employees suffered any losses which should be compensated by payment to the Health Fund. Accordingly, Respondents need not make contributions to that Fund.

(d) Holland House is not liable for the payment of any Fund contributions. Holland House is a successor to J.R.R. and not bound to any contract between the predecessor and the union. It

could therefore unilaterally set the initial terms of employment for its employees. Holland House did not hire a majority of the predecessors' employees. Rather it "found a workforce of replacements," and is not liable for the predecessors' unfair labor practices.

(e) Holland proffered contribution payments to the Union which were rejected. Accordingly, the Union waived payments from Holland House.

(f) increases in the Fund contributions in subsequent contracts is improper.

Analysis and Discussion

The Board's Order in the underlying unfair labor practice case, enforced by the Court of Appeals, required that Respondent J.R.R. and its "successors honor and give retroactive effect from April 1, 1981, to the terms and conditions of the collective bargaining contract with the Union, including payment of wages and benefits as prescribed."

Respondent Holland House is such a successor. As set forth above, Respondents' answer admits that Holland House "has continued to operate the business of Respondent J.R.R. in basically unchanged form...has continued the employing entity with notice of Respondent J.R.R.'s potential liability to remedy its unfair labor practices and is a successor of J.R.R."

The Supreme Court has held in **Golden State Bottling Co. v. NLRB**, 414 U.S. 168 (1973), that a successor which purchases a business with knowledge of its predecessor's unfair labor practices is liable to remedy such unfair labor practices. Holland House is such a successor. Its answer admits that prior to its acquisition

of the property, Holland House was on notice of J.R.R.'s potential liability in the underlying case through Chaim Babad who was a partner in J.R.R. and is the majority shareholder in Respondent Holland House. Accordingly, Holland House is responsible to remedy the violations committed by J.R.R., and is legally obliged to comply with the Board's Order against J.R.R. **Proxy Communications of Manhattan, Inc.**, 290 NLRB No. 68, slip op at 16 (1988).

The extent of its responsibility is the issue here.

Restoration of the Status Quo Ante - Generally

I reject Respondents' argument that, as a successor under **NLRB v. Burns Security Services**, 406 U.S. 272 (1972), Respondents were free to set the initial terms and conditions of employment for their employees. As stated in Respondents' brief, Respondent Holland House "found" a workforce of employees and continued their employment. Its denial that it hired the predecessor's work force is not credited since it "found" and then hired and continued their employment. As such, Respondents were not free to set the initial terms and conditions of their employees. Respondents accordingly had an obligation to consult with the Union before setting terms of employment since it was "perfectly clear" that they intended to continue the employment of the employees they "found."

Holland House, as the successor to J.R.R., is required to remedy the failure of J.R.R. to honor its collective bargaining contract with the Union.

This includes an obligation to pay the employees wages and benefits pursuant to the contract and to make contributions to the Union's pension and health funds. The extent and period of such payments and contribu-

tions, and the persons entitled to payments and contributions in their behalf are all in dispute.

J.R.R., of course, is required to remedy its unfair labor practices to the extent that it is able to do so at this time.

In **Golden State Bottling**, supra, the Court noted that the Act contemplated that the Board would exercise its remedial authority by "striking a balance between conflicting legitimate interests of the bona fide successor, the public, and the affected employee." 414 U.S. at 181. The Court quoted, with approval, the Board's language in **Perma Vinyl**, 164 NLRB 968 (1967), which emphasized the importance of protection of the victimized employees.

As the Board found, and the Court of Appeals enforced, J.R.R. repudiated its contract with the Union and refused to honor it, and made unilateral changes in the terms and conditions of employment of its employees.

It is not disputed that Holland House, as the successor to J.R.R., has similarly refused to honor the contract or remedy the unfair labor practices of J.R.R.

Where a respondent has made pre-impasse unilateral changes in terms and conditions of employment, the Board will require that the status quo ante be restored. **Seascape Golf Course**, 294 NLRB No. 79 (1989); **Lehigh Portland Cement**, 286 NLRB No. 133 (1987).

In order to remedy the unlawful refusal by J.R.R. to honor its contract with the Union, and the unilateral changes in employment conditions imposed by J.R.R., Respondents must restore the status quo ante to that which existed from April 1, 1981, when J.R.R. refused to honor its contract and unilaterally altered the terms and conditions of employment of the employees in the ap-

propriate unit represented by the Union. Accordingly, Respondents are required to restore the terms and conditions of employment to those which existed on April 1, 1981, as set froth in the collective bargaining agreement which was in effect at that time between J.R.R. and the Union. **Sahara Las Vegas Corp.**, 284 NLRB No. 34, slip op at 80-81 (1987).

Respondents argue that such restoration to the status quo ante improperly requires it to assume its predecessor's contract with the Union. The Supreme Court in **Burns** stated that a successor is not required to assume its predecessor's contract, rather its obligation consisted of being required to bargain with the union which represented its employees. Here, however, Holland House has an obligation, pursuant to **Golden State**, to remedy the violations committed by J.R.R. Such a remedy includes a duty to comply with the Board's Order, as enforced by the Second Circuit Court of Appeals, which required J.R.R. and its successors to "honor and give retroactive effect to the terms and conditions of the collective bargaining contract with the Union, including payment of wages and benefits, as prescribed." Such a remedy is consistent with **Golden State**'s emphasis on protecting the employee victims of the unfair labor practices, **State Distributing Co.**, 282 NLRB 1048 (1987), and is also appropriate where Holland House has continued to make unilateral changes in its employees' terms and conditions of employment without bargaining with the Union.[5] Moreover, it must be noted that a status quo ante remedy is particularly appropriate here where Chaim Babad, the main actor in the commission of the violations by J.R.R., is the majority shareholder in Holland House, and has continued to be the principal actor regarding the

5 The "bargaining" which took place will be discussed, infra.

bargaining which has taken place concerning Holland House.

In addition to being required to continue giving effect to the expired contract with respect to wages and other benefits, Holland House is also required to make payments to the pension and health funds, as set forth in the contract. **Seascape**, supra; **Achilles Construction Co.**, 290 NLRB No. 34 (1988); **Beitler-McKee Optical Co.**, 287 NLRB No. 142 (1999).

In this respect, I reject Respondents' argument that they are not required to make payments to the health funds for contributions owed, but rather are responsible, only for any claims which may have been made by employees. The Board rejected such a contention in **Achilles**, supra, at n. 12:

> In order to be made whole, however, a discriminatee must be restored to the position he would have occupied had the discrimination not occurred. This included not only reimbursement of the discriminatee's premiums and medical expenses, but also requires the Respondent to contribute to the welfare fund according to the expired contract's terms so that the discriminatee's future interests in the Fund will be ensured. 'The diversion of contributions from the union funds undercuts the ability of those funds to provide for future needs.'

In this connection, Respondents' reliance upon **Coletti Color Prints, Inc.**, 204 NLRB 647 (1973) is misplaced. In that case, the Board held that the respondent was not required to make contributions to the union's funds because the Board's order provided only for a make whole remedy. Here, however, the Board's Order, in addition to a make whole remedy, required that Respondents "honor and give retroactive effect ... to the

terms and conditions of the collective-bargaining contract ... including payment of ... benefits as prescribed."

Furthermore, Holland House will be required to continue giving effect to the expired 1979 contract with the Union, and make whole the employees and their replacements by remitting all wages and benefits that would have been paid absent the unilateral changes and repudiation of the contract, from April 1, 1981 until it negotiates in good faith with the Union to agreement or to impasse.

In this regard, Respondents assert that they have already bargained to impasse with the Union.

In **Sierra Publishing Co.**, 291 NLRB No. 84 (1988) the Board discussed impasse, as follows:

> The Board has long held that an impasse occurs 'after good faith negotiations have exhausted the prospects of concluding an agreement....'
>
> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

The bargaining which occurred consisted of a series of letters between the Respondents and the Union, and 2 brief meetings. In its letters, the Union sought to have Respondents restore the status quo ante by honoring the expired contract and making retroactive payments to employees, their replacements and the funds,

and also sought information concerning the wages and benefits paid to their current employees.

At the one hour meeting on March 25, 1987, Union attorney Sturm received part, but not all of the information he requested. Sturm stated that the purpose of the meeting was not to negotiate, but to discuss the restoration of the status quo ante. The conditions of employment of the current workers were discussed. The meeting ended when Sturm requested that Respondents notify him when they complied with the expired contract and remedied the unfair labor practices.

At the approximately 45 minute meeting on May 21, 1987, notwithstanding that it was the Union's position that it was not obligated to bargain until the conditions which existed prior the commission of the unfair labor practices were restored, Sturm and Respondents discussed a prospective contract. Sturm offered 2 options to Respondents: that they accept the current standard contract or negotiate with the Union for a separate agreements. Respondents stated that they would negotiate for a new agreement, and the Union accepted that proposal, and at the at meeting the Union made proposals for a new contract.

Also at that meeting, the parties discussed medical coverage for current workers and whether the coverage which Respondents desired could be purchased from the Union's Health Fund. Respondents offered to accept the standard agreement, with the major modification that the wages paid to the employees be less than those provided for in the standard agreement. The Union rejected that proposal and the meeting ended.

Under these circumstances, it can hardly be said that impasse has occurred. Respondents claim that the Union's rejection of their wage offer effectively created an impasse which could not be resolved. However, the

Union's failure to agree to Respondents' wage offer was understandable. Respondents agreed to accept the standard industry agreement but refused to accept that agreement **in toto**. Accordingly, the Union was of the view, properly held, that if Respondents wished to accept the standard contract, they should accept the entire agreement.

Moreover, in rejecting the Respondents' wage offer, Sturm did not say that the Union would never consider any modification in the standard contract's wage rate. "Respondents could not justifiably conclude that the Union's position as then expressed was its final word on the subject." **Association of D.C. Liquor Wholesalers**, 292 NLRB No. 132, slip op at 7 (1989).

Accordingly, based upon the 2 brief meetings between the parties, the Union's unsuccessful attempts to have Respondents restore the status quo ante, and the way the negotiations were left, it is apparent that if any good faith negotiations occurred, they have not "exhausted the prospects of concluding an agreement." Respondents' good faith in offering to accept the standard contract, but not its wage rates is also questionable. It is clear, therefore, that impasse has not occurred. It cannot even be said that good faith negotiations have occurred.

Restoration of the Status Quo Ante - To Whom and for What Period

General Counsel argues that wages and benefits, including contributions to the funds, are required to be paid in behalf of 6 employees, the number of people employed at the time of the commission of the unfair labor practices by JR.R. Respondents assert that neither J.R.R. nor Holland House ever employed more than 4 employees at any one time, and that therefore, they

should not be required to make contributions in behalf of more than 4 persons.

I agree with General Counsel. The Board found that at the time that J.R.R. purchased the building, 6 employees were employed there. The Board further found that J.R.R., by Babad, unlawfully discharged those 6 employees and instituted unilateral changes in the employment of their replacements. It would be grossly unfair to permit Respondents to profit by their wrongdoing, and to acquiesce in their unilateral change by employing fewer than 6 employees at the building. In addition, it should be noted that the contract between J.R.R. and the Union provided, in Article X paragraph 19, that if the employer wished to reduce its force, it must provide the Union with 4 weeks' written notice of such intention. Such notice was not provided here and accordingly J.R.R. violated the terms of its contract by reducing its work force from 6 to some lesser number.

Accordingly, I will recommend that the Respondents be required to make contributions in behalf of 6 persons.

Respondents also note that the Board's remedy only covered the discharged employees, and not their replacements. They accordingly argue that payments of wages, benefits or fund contributions cannot be ordered for the replacement employees. In **Ad-art, d/b/a Electrical Products Corp.**, 290 NLRB No. 74 (1988), the Board provided a make-whole remedy for employees who replaced unlawfully terminated employees. The Board stated:

> All replacements performing work that should have been performed under the applicable collective-bargaining agreements are entitled to be made whole for any losses they may have suffered by reason of the Respondents' failure and

refusal to honor the agreements, including all contributions the Unions would have received in accordance with the agreements.

Accordingly, I will recommend that the remedy provided herein will apply to the replacement employees who replaced the unlawfully terminated employees.

General Counsel further argues that, in addition to being required to make payments to the Union's Pension and Health Funds pursuant to the "Apartment House Agreement" - the collective bargaining contract which ran from April 21, 1979 through April 20, 1982 and which the Board found that J.R.R. had assumed, Respondents should also be required to pay the increases in those Funds as set forth in succeeding "Commercial Building Agreements" - collective bargaining contracts which ran from January, 1981 through December 1983; January 1984 through December, 1986; and January, 1987, through December, 1989.

General Counsel and the Union accordingly argue that Respondents' 1979 contract requires such increases in Fund contributions during the backpay period.

The parties' 1979 contract at Article X, paragraph (D)(2) states:

> Any contributions and benefits required hereunder shall be increased by any amount in the same manner as contributions and benefits may be increased in the 1981 Commercial Building Agreement (or its successor) between the Union and the RAB (Realty Advisory Board) and if service fees are required to be paid, the same fees shall be required to be paid hereunder.

In this regard, Article VI, paragraph 1(d) of the parties' 1979 contract is also instructive:

> Upon the expiration date of this agreement... (it) shall thereafter continue in full force and effect for an extended period until a successor agreement shall have been executed. During the extended period, all terms and conditions hereof shall be in effect.... During the extended period, the Employer shall negotiate for a successor agreement....

Respondents, in their brief, concede that during the term of the parties' 1979 contract, they were aware that the 1981 commercial building agreement would be negotiated, and further conceded in the April 7, 1987 letter to the Union that the 1979 contract "does provide that increases in the 1981 commercial (contract) or its successor shall reflect on the contributions for the contract." However, Respondent argues that the increase in contributions as set forth in the 1981 commercial contract cannot extend beyond April 20, 1982, the expiration date of the 1979 contract.

I agree, in part, with Respondent. The language of the 1979 contract, as argued by Respondent, contemplates that the increased contribution amounts are to be raised only as set forth in the 1981 commercial agreement or its successor. It is nowhere provided that increases set forth in the successor contracts to the 1981 contract would become the responsibility of Respondent. It is logical that, inasmuch as the parties were aware that the 1981 commercial agreement was being negotiated during the term of the 1979 contract, that increases in the fund amounts in that contract alone would be deemed to be a part of the 1979 apartment house agreement. The term the "1981 commercial agreement or its successor" means just that — that the increases in the funds set forth in the commercial agreement then being negotiated would be incorporated in the 1979 apartment house contract. The provision does not say the "1981 commercial

agreement and its successors," which is the interpretation given the term by General Counsel and the Union. Indeed, that interpretation, which would require Respondents to continue to pay whatever fund increases the Realty Advisory Board and the Union negotiate in future contracts would amount to making a new contract for the parties. Such an approach would violate the Supreme Court's holding in **H.K. Porter v. NLRB**, 397 U.S. 99 (1970), that the Board has no authority to compel agreement as to any substantive provision in a collective bargaining contract.

I accordingly find that upon the effective date of the 1981 commercial building agreement, Respondents became responsible for the increased amounts of fund contributions as set forth in that agreement. I further find that pursuant to their obligation to continue to pay fund contributions beyond the expiration date of the 1979 contract, Respondents continued to be liable , and were required to continue to pay to the funds such amounts of contributions as set forth in the 1981 commercial agreement. Such obligation to continue to make fund contributions continues from the effective date of the 1981 contract until Respondents restore the status quo ante. The contributions were and are required to be made on behalf of 6 persons, as set forth above.

I have considered that in September, 1987, Respondents proffered certain amounts of fund contributions to the Union funds which the Union funds refused to accept. Respondents argue that this constitutes a waiver by the Union of any right it may have to be entitled to contributions past the expiration date of the 1979 contract. However, the contributions which Respondents sought to pay were contributions at the "1987" rates in order to provide coverage for their current employees. Union attorney Sturm advised Respondents that the Fund was prohibited from accepting such contributions

in the absence of a written agreement setting forth the basis for the contribution, and consequently such contributions would not be accepted. This refusal to accept the 1987 contributions for coverage at the "current" rates does not conflict with my findings here. Respondents simply sought current coverage without regard to the substantial amounts owed to the Fund by virtue of their failure to make contributions since 1981. This, the Union attorney advised could not be done. I note that the Fund did accept contributions in April, 1987 from Respondents, which it applied to amounts owed retroactively from 1981.

The Union also argues that Respondents be required to pay liquidated damages upon the unlawfully withheld fund contributions, as assessed by the Funds against employers who are delinquent in making fund contributions. The General Counsel does not join in this argument, citing **Merryweather Optical**, 240 NLRB 1213, 1216, n. 7 (1979).

The Union argues that inasmuch as Respondents were ordered to honor and retroactively apply the 1979 contract, all terms of that contract must be enforced. Article X, paragraph D(1) provides that:

> If the Employer fails to make required reports or payments to the Funds, the Trustees may in their sole and absolute discretion take any action necessary including but not limited to immediate arbitration and suits at law, to enforce such reports and payments, together with interest and liquidated damages as provided in the Funds' Trust Agreements, and any and all expenses of collection, including but not limited to counsel fees, arbitration costs and fees, court costs, auditors' fees and interest.

The Agreement and Declaration of Trust between the RAB and the Union which was in effect at the time of the 1979 contract, states as follows:

> The Trustees, in their sole and absolute discretion, may enforce the payment of Employer Contributions to the Trust Fund together with liquidated damages at the rate of one and one-half per cent per month for any contribution made more than 30, but less than 50 days after the date it first became due, such liquidated damages to be retroactive to the first date such contribution was due, and two and one-half per cent per month for any contribution received more than 50 days after the first day such contribution became due, such liquidated damages to be retroactive to the first date such contribution was due, any and all expenses of collection, including, but not limited to, audit fees, counsel fees, arbitration costs and fees and court costs, whether by utilizing arbitration procedures provided for in the collective bargaining agreements or otherwise.

The Board has regularly provided for the payment of liquidated damages to certain funds where the trust agreements provide for liquidated damages. **Stone Boat Yard**, 276 NLRB 1185, 1188-1189 (1985); **G.T. Knight Co.**, 268 NLRB 468, 469-470 (1983); **Peerless Roofing Co.**, 247 NLRB 500, 504, 505 (1980).

I accordingly will include a recommendation that Respondents pay to the Funds additional sums representing liquidated damages, as set forth in the Trust Agreement.

Persons Entitled to Payment

Matters unresolved by the parties' agreement, as set forth in General Counsel's Motion, include the following:[6]

> (a) The claims of replacement employees for wages, holidays, vacation, birthdays or sick pay for the period after January 1, 1989.
>
> (b) The claim of employee Colin Wayneschloss, or the claims of any employees hired after January 1, 1989.

There was no evidence adduced at the hearing, which closed on December 6, 1988, as to who was employed after January 1, 1989. However, it appears that 3 people were employed at the time of the hearing: Peter Berisha, Albert Gordon and Colin Wayneschloss. Berisha and Gordon testified at the hearing. Respondents' official Lichtenthal testified that Wayneschloss began his employment with Respondents in late, 1987, replacing Neadson Holder. Lichtenthal further stated that Wayneschloss, who was employed at the time of the hearing, performs the same work as Peter Berisha and Albert Gordon.

In addition to Peter Berisha and Albert Gordon, the amended backpay specification lists the following as replacement employees:

6 The other issue, discussed above, is the question of the contributions owed to the Building Service Local 32B-32J, Pension and Health Funds on behalf of the discriminatees and their replacements as alleged in Amended Appendix G, and Appendices R and S of the Amended Backpay Specification.

(a) Dede "David" Berisha - He was last employed in March, 1984, according to the specification.

(b) Zeff "Joe" Berisha - He was last employed in April, 1982, according to the specification.

(c) Mark Berisha - He was last employed in about 1982, according to the testimony of Peter Berisha.

(d) Neadson Holder - He was last employed in late, 1987, according to the testimony of Lichtenthal.

(e) Anthony Falcone - There was no testimony concerning when he left Respondents' employ.

(f) Joseph Falcone - He was last employed in April, 1985, according to the specification.

(g) Nadu Gegage - He was last employed in November, 1984 according to the specification and was no longer employed at the time of the hearing, according to Peter Berisha's testimony.

(h) Kadrush Mahanti - He was last employed in August, 1983, according to the specification.

Accordingly, it appears that Peter Berisha, Albert Gordon and Colin Wayneschloss are the only replacement employees who were conceivably employed after January 1, 1989. Assuming that these individuals were employed after January 1, 1989, they would be entitled to the following sums.

In addition, any other employees who were hired after January 1, 1989 would also be entitled to the following:

Wages

The rider to the 1979-1982 collective bargaining agreement provides that effective in april, 1981, employees shall receive a minimum wage of $220.00 per

week. Such sum represents $5.50 per hour for a 40 hour week. The contract states that the standard work week consists of 40 hours. The wage rate of $5.50 per hour is the amount which was claimed in the backpay specification for Peter Berisha and Albert Gordon. Such rate of pay is also the amount required to be paid Wayneschloss.

Other replacement employees or other workers hired after January 1, 1989 are also entitled to be paid at the rate of $5.50 per hour.

Inasmuch as there was no evidence as to (a) whether Berisha, Gordon or Wayneschloss or any others were employed after January 1, 1989 or (b) how many hours they worked or (c) how much they received as wages, I am unable to compute the amounts owed. However, it is clear that any employees employed after January 1, 1989 were entitled to receive wages at the rate of $5.50 per hour.

Holidays

Pursuant to Article X, paragraph 3 of the 1979-82 contract, employees were entitled to receive their straight-time pay for 10 enumerated holidays. In addition, any work required to be performed on the stated holidays must be paid for at time and one-half as holiday pay in addition to 8 hours' pay received for the holiday.

The holidays provided for in the contract are:

> New Year's Day, Lincoln's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Election Day, Thanksgiving Day and Christmas Day.

Any employees employed after January 1, 1989 are entitled to holiday pay at the contractual rates. Inasmuch as there is no evidence as to who was employed after

January 1, 1989, or whether any of those persons worked on any holiday, it is not possible to compute the amount owed to specific persons.[7]

Vacation

According to Article X, paragraph 10 of the 1979-82 contract, employees employed from 1 to 4 years are entitled to 2 weeks paid vacation, and employees employed from 5 to 14 years are entitled to 3 weeks paid vacation.

Peter Berisha began his employment with Respondents in April, 1981. Assuming that he was employed after January 1, 1989, he would have been employed for nearly 8 years, and would there be entitled to 3 weeks paid vacation as of January 1, 1989, the date set forth in General Counsel's Motion. Inasmuch as Berisha's hourly rate is $5.50 , and his weekly rate at 40 hours per week is $220., he is entitled to 3 weeks paid vacation, or $660 for 1989.

Albert Gordon became employed by Respondents on November 16, 1984. Assuming that he was employed after January 1, 1989, he would have been employed for 4 years, 1 and 1/2 months as of January 1, 1989. He would therefore be entitled to receive 2 weeks paid vacation in 1989. He would not be eligible to receive 3 weeks paid vacation until November, 1989, for the vacation period May 1 through September 15, 1990.

7 It is alleged in the backpay specification that Peter Berisha worked 10 hours on the holidays. Assuming Berisha's continued employment after January 1, 1989, it is not known whether this alleged practice continued after that date.

Accordingly, Albert Gordon was entitled to 2 weeks paid vacation, or $440, for 1989.

Colin Wayneschloss was employed by Respondents in late, 1987. Assuming that he was employed after January 1, 1989, Wayneschloss was employed for more than 1 year, and is entitled to 2 weeks paid vacation, or $440 for 1989.

With respect to other employees who may have been hired after January 1, 1989, the contract provides that employees who have worked from 6 months to 1 year are entitled to 3 days paid vacation.

Birthdays and Sickness Benefits

Article X, paragraphs 5 and 36, provide for payment for an employee's birthday and sickness benefits.

Generally, the contract provides that the employee's birthday shall be a paid day off.

Assuming that Peter Berisha, Albert Gordon and Colin Wayneschloss were employed after January 1, 1989, they would all have been entitled to a paid day for their birthday. The amount of payment would be $44.00. In addition, any other employee hired after January 1, 1989 is entitled to a paid birthday.

In addition, the contract provides that a regular employee with a least 1 year of service shall receive 10 paid sick days per year. The contract further provides that employees who have worked the entire year without using all the sickness benefits, shall be paid in the succeeding January, 70% of a day's pay for each unused day, not to exceed 7 days' pay.

As to those employees employed after January 1, 1989, there is no evidence as to whether they were out

sick during 1989 or were paid sickness benefits. Moreover, it will not be known, until the end of 1989, whether they are entitled to the 70% amount for not using all their sickness benefits. Accordingly, I am unable to compute the amount of sickness benefits for any employees employed after January 1, 1989.

Contributions due to the Pension and Health Funds

As set forth above, I have found that Respondents are obligated to make contributions for six employees to the Local 32B-32J Pension Fund and the Local 32B-32J Health Fund from April 1, 1981 for contributions owed. I have further found that the 1979 Apartment House Agreement provides that any contributions and benefits required under that contract shall be increased by any amount as contributions may be increased in the 1981 Commercial Building Agreement. Inasmuch as that 1981 contract was in effect January 1, 1981, at a time when the unfair labor practices occurred (March 31, 1981), I find that the increases set forth in the 1981 agreement are properly incorporated in the 1979 Apartment House Contract, and those increases may properly be included in the amounts required to be contributed. I have also rejected the arguments of General Counsel, and the Union that Respondents are required to pay the increases in contribution rates set forth in collective bargaining agreements subsequent to the 1981 Commercial building Agreement. Moreover, I have found, in agreement with the Union, that it is contractually entitled to the payment by Respondents of liquidated damages on the unpaid contributions to the Health and Pension Funds.

Concerning the rates of contributions to the Health Fund, the 1981 Commercial Building Agreement provides, in Article XI, paragraph A. 2-3, that effective January 1, 1981, the employer shall contribute to the

Fund, $660.00 per year per employee. That contract further states that effective January 1, 1982, the employer shall contribute $712.00 per year per employee, and effective January 1, 1983, the employer shall contribute $816.00 per year per employee.

Concerning the rates of contributions to the Pension Fund, the 1981 Commercial Building Agreement provides, in Article X, paragraph B. 2, that effective January 1, 1981, the employer shall contribute to the Fund $11.00 per week per employee. The contract further states that effective January 1 1982 the employer shall contribute $12.00 per week employee.

With respect to the amounts of liquidated damages required to be paid to the Union's Funds, the Health and Pension Funds Trust Agreements provide, as set forth above, that if contributions are more than 50 days late, a charge of 2.5% per month is applied to the unpaid principal. That charge is retroactive to the first date the contribution was due.

Thus, the period from April 1, 1981, the date set forth in the Board's Decision as the date beginning which Respondents were required to honor the contract, to December 31, 1988, comprises 93 months. For example, for the first quarter in which the contributions were due, April 1, 1981 (the second quarter of 1981), the health fund contributions of $990.00 has been unpaid for 93 months. Ninety three months times 2.5% per month is 232.5%. The sum of $990.00 times 232.5% equals $2301.75. That amount represents the health fund liquidated damages. For each succeeding quarter, the number of months multiplied by 2.5% is reduced by 3. The same formula has been used to compute the pension fund liquidated damages.

Year	Qtr.	H.F. Cont.	H.F.L.D.	P.F. Cont.	P.F.L.D.[8]	Per Cent
1981	2	$990.00[9]	$2301.75	$858.00[10]	$1994.85	232.5
	3	990.00	2227.50	858.00	1930.50	225.
	4	990.00	2153.25	858.00	1866.15	217.5

8 These figures constitute contributions for 6 positions. The abbreviations are as follows:
H.F. Cont. - Health Fund Contributions
L.D. - Liquidated Damages
P.F. Cont. - Pension Fund Contributions

9 The 1981 Health Fund Contributions are computed as follows:
The 1981 Commercial Building Agreement requires contributions of $660.00 per year per employee, effective January 1, 1981. The quarterly amount is $165.00 per employee. $165.00 times 6 positions equals $990.00.

10 The 1981 Pension Fund Contributions are computed as follows:
The 1981 Commercial Building Agreement requires contributions of $11.00 per week per employee effective January 1, 1981. Eleven dollars per week times 6 positions times 13 weeks per quarter equals $858.00

1982	1	1068.00[11]	2242.80	936.00[12]	1965.60	210.
	2	1068.00	2162.70	936.00	1895.40	202.5
	3	1068.00	2082.60	936.00	1825.20	195
	4	1068.00	1997.16	936.00	1755.00	187.5
1983	1	1224.00[13]	2203.20	936.00	1684.80	180.
	2	1224.00	2111.40	936.00	1614.60	172.5
	3	1224.00	2019.60	936.00	1544.40	165.
	4	1224.00	1927.80	936.00	1474.20	157.5
1984	1	1224.00	1836.00	936.00	1404.00	150.
	2	1224.00	1744.20	936.00	1333.80	142.5
	3	1224.00	1652.40	936.00	1263.60	135.
	4	1224.00	1560.60	936.00	1193.40	127.5
1985	1	1224.00	1468.80	936.00	1123.20	120.
	2	1224.00	1377.00	936.00	1053.00	112.5
	3	1224.00	1285.20	936.00	982.80	105.
	4	1224.00	1193.40	936.00	912.60	97.5
		21930.00	35547.36	17550.00	28817.10	
1986	1	1224.00	1101.60	936.00	842.40	90.
	2	1224.00	1009.80	936.00	772.20	82.5
	3	1224.00	918.00	936.00	702.00	75.
	4	1224.00	826.20	936.00	631.80	67.5
1987	1	1224.00	734.40	936.00	561.60	60.
	2	1224.00	642.60	936.00	491.40	52.5
	3	1224.00	550.80	936.00	421.20	45.
	4	1224.00	459.00	936.00	351.00	37.5

11 The Health Fund contributions were increased to 712.00 effective January 1, 1982.

12 The Pension Fund contributions were increased to $12.00 effective January 1, 1982.

13 The health contributions were increased to 816.00 effective January 1, 1983.

1988	1	1224.00	367.20	936.00	280.80	30.
	2	1224.00	275.40	936.00	210.60	22.5
	3	1224.00	183.60	936.00	140.40	15.
	4	1224.00	91.80	936.00	70.20	7.5
		14688.00	7160.40	71232.00	5475.60	

On the basis of the foregoing, and on the entire record of this proceeding, I issue the following recommended:

ORDER[14]

The Respondents, Chaim Babad, Bernard Steinmetz and Emanuel Steinmetz, a co-partnership d/b/a J.R.R. Realty Co., and Holland House Tenants Corporation, Additional Respondent, their officers, agents, successors and assigns, shall:

1. Make whole each of the employees who were employed on and after April 1, 1981 at the building located at 73-37 Austin Street, Forest Hills, New York, now known as Holland House, by paying such employees (called replacement employees in this Supplemental Decision) such sums of money plus interest[15] which they are entitled to for wages, holidays, vacation,

14 If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

15 Interest on and after January 1, 1987 shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 6621. **New Horizons for the Retarded**, 283 NLRB 1173 (1987). Interest on amounts accrued prior to January 1, 1987 shall be computed in accordance with **Florida Steel Corp.**, 231 NLRB 651.

birthdays and sickness benefits, as set forth in this Supplemental Decision, for the period after January 1, 1989.

2. Pay to the Local 32B-32J Pension Fund the sum of $123,074.70 plus interest which represents the amount owed from April 1, 1981 to December 31, 1988. Pay to the Local 32B-32J Health Fund the sum of $79,325.76 plus interest which represents the amount owed from April 1, 1981 to December 31, 1988.

3. Honor and give effect to the terms and conditions of the collective bargaining agreement with Local 32B-32J, Service Employees International Union, AFL-CIO, as ordered by the Board and enforced by the Second Circuit Court of Appeals.

Dated, Washington, D.C.: **January 10, 1990**

Steven Davis
Administrative Law Judge

APPENDIX

The transcript herein is hereby corrected as follows:

1. Page 149 line 4, change the word "Department" to "Apartment".

2. Page 151 line 16, change "72" to "32".

3. Page 152 line 16, change "we refer" to "is referred".

4. Page 152 line 17, omit the word "but"; put a period following the word "clause" and capitalize the word "that".

5. Page 152 line 20, change the phrase "another agreement, but..." to "a new agreement. But..."

6. Page 153 lines 7 and 8, capitalize the name "Realty Advisory Board on Labor Relations, Inc."

7. Page 153 line 17, insert a comma following the word "clause."

8. Page 154 line 25, change the word "unemployment" to "unfair labor practice".

9. Page 155 line 9, change the words "to serve" to "for cert.".

10. Page 157 line 3, omit the word "office" and insert the words "compliance officer".

11. Page 157 line 21, change the word "the" to "Mr".

12. Page 157 line 25, change the word "no" to "not".

13. Page 158 line 15, insert the word "at" following the word "least".

15. Page 159 line 4, insert the word "an" following the word "in".

16 Page 159 line 14, omit the comma following the word "recollection" and insert a comma on the following line after the word "correspondence".

17. Page 161 line 4, change the word "dependents" to "residents".

18. Page 161 line 14, change the words "of the" to "to".

19. Page 161 line 18, correct the spelling of the word "conversation".

20. Page 161 line 19, change the phrase "or that's submissible" to "that's admissible,".

21. Page 162 line 12, correct the spelling of the name to read "Larmond".

22. Page 163 line 8, change the word "discussion" to "discussing".

23. Page 163 line 8, change "Tuchman" to "Babad".

24. Page 164 line 3, change the word "was" to "were".

25. Page 164 line 7, omit the word "than" and insert a comma after the word "Holder".

26. Page 164 line 7, omit the words "there was" and insert "they were".

27. Page 165 line 14, change the comma to a period and capitalize the word "The".

28. Page 165 line 17, change the word "employee" to "employer".

29. Page 165 line 19, correct the spelling of the word "hadn't".

30. Page 166 line 11, change the word "fix" to "six".

31. Page 186 line 19, change the word "that's" to "they're".

32. Page 169 line 13, change the word "they" to "the".

33. Page 169 line 15, change the words "the credit" to "they credit".

34. Page 169 line 23, omit the words "a writ" and insert the word "ERISA".

35. Page 169 line 24, change the word "to" to "for".

36. Page 171, correct the spelling of the names "Larmond", "Lichtenthal", and "Falcone".

37. Page 173 line 17, correct the spelling of the word "was".

38. Page 174 line 6, change the word "ultimate" to "various".

39. Page 174 line 17, change the word "perspectviely" to "prospectively".

40. Page 177 line 2, correct the spelling of the name "Scardilly".

41. Page 179 line 22, change the word "Berlitz" to "Board's".

42. Page 181 line 14, correct the spelling of the word "charging".

43. Page 181 line 21, change the word "plane" to "plan".

44. Page 182 lines 18-21, amend entire answer to read:

"Without exception, they are demanded and collected, unless they're judgment proof and we can't collect it. But without exception, the fund always goes with the liquidated damages"

45. Page 182 line 22, change the word "employee" to "employer".

46. Page 183 line 14, omit the words "the risk" and insert "ERISA".

47. Page 184 line 11, correct the spelling of the name to "Sturm".

48. Page 184 line 16, change the word "her" to "him".

49. Page 184 line 20, omit the phrase " Arissa which mandates the election..." and insert "ERISA" mandates the collection..."

50. Page 185 line 4, change the word "liquidating" to "liquidated".

51. Page 186 line 3, change the word " Arissa" to "ERISA".

52. Page 188, change the word "circuit" to "cert".

53. Page 188 line 15, change the word "sociary" to "certiorari".

54. Page 188 line 22, change the word "hearing" to "rehearing".

55. Page 190 line 17, change the word "discussing" to "discharging".

56. Page 196 line 15, change the word "they" to "that".

57. Page 196 line 23, omit the phrase "...bill, that Holland House bought..." and insert "...bills, that Holland House be billed...".

58. Page 197 lines 4,11,17 & 24, change the word "U" to "Hewes".

59. Page 199 line 8, change the word "employee" to "employer".

60. Page 199 line 9, insert a period after the word "paid" and capitalize and correct the word "your" to read "You're".

61. Page 199 line 10, change the word "here" to "here's".

62. Page 201 line 14, omit the word "of" and insert "on behalf of".

63. Page 202 lines 24-25, amend answer to read:

"32b is a Union. The Funds are Taft-Hartley funds. They operate pursuant to ERISA and Landrum-Griffin and ..."

64. Page 203 line 11, change the word "correspondence", to "correspondences".

65. Page 204 line 18, change the word "hearing" to "rehearing".

66. Page 204 line 19, change the word "state" to "stayed".

67. Page 205 line 24 and page 206 line 7, change the word "cirq" to "cert."

No. 91-2029

In the Supreme Court of the United States

OCTOBER TERM, 1992

JRR REALTY & HOLLAND HOUSE TENANTS CORP.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board acted within its discretion in ordering petitioners—an employer and its successor—to make retroactive contributions to the union's benefit funds.

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NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A1-A6) is unpublished, but the judgment is noted at 955 F.2d 764 (Table). The supplemental decision and order of the National Labor Relations Board (Board) (Pet. App. A11-A64), which includes the decision of the administrative law judge, is reported at 301 N.L.R.B. No. 67.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1992. A petition for rehearing was

denied on April 23, 1992. The petition for a writ of certiorari was filed on June 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 31, 1981, petitioner J.R.R. Realty Co. (JRR) purchased an apartment building in Queens, New York, which was owned by JARU Properties, Inc. and ASCR Realty, Inc. and managed by J.A.R. Management Corp. (JAR). JAR had entered into a collective bargaining agreement with Local 32B-32J, Service Employees International Union, AFL-CIO (Union), covering the six service employees who worked at the apartment building. On April 1, 1981, JRR discharged the six employees and refused to recognize or bargain with the Union.

In a subsequent unfair labor practice proceeding, the Board, in agreement with the administrative law judge (ALJ), found that JRR violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act) (29 U.S.C. 158(a)(3) and (1))[1] by discharging the employees because of their membership in and support of the Union, and in order to evade its bargaining obligations as a successor employer under *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972). *J.R.R. Realty Co.*, 273 N.L.R.B. 1523, 1526-1527 (1985). The Board also found that JRR, as successor employer, violated Section 8(a)(5) and (1) of

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[1] Section 8(a)(3) makes it an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.

the Act (29 U.S.C. 158(a)(5) and (1))[2] by refusing to bargain with the Union as the employees' representative, and by refusing to honor the collective bargaining agreement between JAR and the Union, which the Board determined JRR had adopted when it purchased the building. 273 N.L.R.B. at 1526, 1529. The Board, accordingly, ordered JRR to offer reinstatement to the six discharged employees, to bargain with the Union as the exclusive representative of its employees, and to honor and give retroactive effect from April 1, 1981, to the terms and conditions of the collective bargaining agreement, "including payment of wages and benefits as prescribed" in the agreement. *Id.* at 1529.[3] The Second Circuit enforced the Board's order, holding that substantial evidence supported the Board's findings that JRR had adopted JAR's labor contract and committed unfair labor practices. *NLRB* v. *Babad*, 785 F.2d 46, 50 (1986), cert. denied, 479 U.S. 830 (1986).

2. The Board's Regional Director then initiated a compliance proceeding against JRR and petitioner Holland House Tenants Corp. (Holland House), which had purchased the apartment building from JRR in June 1984, while the ALJ's decision in the unfair labor practice case was pending before the Board. Pet. App. A32 n.4. The Board's General Counsel sought retroactive payment of wages and contributions to the Union's health and pension funds on behalf of the six illegally discharged service employees and those

[2] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

[3] Petitioners' statement (Pet. 12) that the Board's order "does not directly order payments to the [f]unds" is incorrect. Fund contributions are a "benefit" provided the members of the bargaining unit by the "terms and conditions" of the contract. Pet. App. A44-A45.

persons whom JRR hired to replace them. *Id.* at A30, A39. In its answer to the Regional Director's amended backpay specification, Holland House admitted that it is a successor employer to JRR and that, prior to acquiring the apartment building from JRR, it was on notice of JRR's potential liability in the unfair labor practice case. *Id.* at A32.

After a hearing, the ALJ ruled that "[i]n order to remedy the unlawful refusal by J.R.R. to honor its contract with the Union * * * [JRR and Holland House] must restore the status quo ante to that which existed from April 1, 1981, when J.R.R. refused to honor its contract and unilaterally altered the terms and conditions of employment of the employees in the appropriate unit represented by the Union." Pet. App. A42-A43. Accordingly, relying on settled Board law,[4] the ALJ recommended that the Board order petitioners to make payments to the Union's benefit funds for a complement of six employees for the period April 1, 1981, through December 31, 1988. *Id.* at A44, A64.[5] The ALJ rejected the contention that, because JRR had never employed more than four service workers after it assumed operation of the building, petitioners should be required to make

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[4] *Seascape Golf Course*, 294 N.L.R.B. 881 (1989); *Achilles Constr. Co.*, 290 N.L.R.B. 240 (1988), enf'd mem., 875 F.2d 308 (2d Cir.), cert. denied, 493 U.S. 823 (1989); *Beitler-McKee Optical Co.*, 287 N.L.R.B. 1311 (1988).

[5] Before the hearing, the parties settled the Regional Director's backpay claim for that time period (Pet. App. A16 & n.8, A29), but litigated the amount of backpay owed by petitioners after January 1, 1989. The ALJ determined, and the Board agreed, that employees employed after January 1, 1989, are entitled to wages and fringe benefits, such as paid holidays and vacations, that are prescribed in the collective bargaining agreement. *Id.* at A54-A59, A16-A17. Petitioners do not seek further review of that ruling.

contributions for only four, not six, employees. *Id.* at A48. The ALJ also rejected Holland House's argument that it is not liable for JRR's unfair labor practices. The ALJ noted that, under *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973), a successor employer who purchases a business with knowledge of its predecessor's potential unfair labor practice liability is liable for remedying the predecessor's unfair labor practices. Pet. App. A40-A41. Holland House is obligated to make the Union funds whole, the ALJ determined, because Holland House admitted that it is a successor employer to JRR and knew of JRR's potential liability in the unfair labor practice proceeding when it acquired the apartment building from JRR. *Ibid.*

The ALJ found no merit in Holland House's contention that it cannot be ordered to restore the *status quo ante* under *Golden State* because such an order improperly requires it to assume JRR's labor contract. Pet. App. A43. The ALJ recognized that, under *NLRB* v. *Burns International Security Services, Inc.*, *supra*, the Board cannot bind a successor employer to the terms and conditions of the predecessor's collective bargaining agreement, but ruled that, since Holland House was a *Golden State* successor, it was required to remedy JRR's unfair labor practices. Pet. App. A43. Moreover, the ALJ found that Holland House could not avail itself of a successor's freedom, provided by *Burns*, to fix its initial terms and conditions of employment without bargaining with the Union. Since Holland House had made it "perfectly clear" that it intended to continue to employ the bargaining unit when it succeeded JRR, the ALJ determined that *Burns* required Holland House to consult with the Union before fixing initial terms. *Id.* at A41.

The Board affirmed those rulings by the ALJ in a supplemental order. The Board agreed with the ALJ that petitioners should be required to restore the *status quo ante*, retroactive to April 1, 1981, and determined that petitioners must make contributions on behalf of six (not four) employees "in order to ensure the actuarial soundness of the funds." Pet. App. A15, A17 & n.11.[6] Accordingly, the Board ordered petitioners to pay $69,287.34, plus interest, to the Union pension fund and $122,448.94, plus interest, to the Union health fund. *Id.* at A26. The Board found no merit to petitioners' contention that they are liable to the Union's funds only to the extent that the funds paid benefits to members of the bargaining unit. The Board distinguished *Coletti Color Prints, Inc.*, 204 N.L.R.B. 647 (1973), upon which petitioners' argument primarily relied, since *Coletti* involved an agreement with a union that "lost a Board election after the agreement expired and, further, involved school and medical insurance funds from which the employees could benefit only during the life of the contract which required such payments." Pet. App. A15 n.7. By contrast, the Board found that "the Union here continues to be the employees' bargaining representative and the unit employees have an interest in the continuance of the funds and their financial stability."[7] *Ibid.*

[6] The Board, in agreement with the ALJ, determined that the collective bargaining agreement and the funds' trust agreement provided for payment of liquidated damages to the funds, at the discretion of the fund trustees. Pet. App. A21 n.16. The Board thus required petitioners to pay liquidated damages only if the fund trustees decided to impose them. *Ibid.*

[7] The Board modified the ALJ's decision in two respects. First, the ALJ had not ordered petitioners to make contributions to the Union's pension fund on behalf of the six illegally discharged employees for the periods during which they are

3. The court of appeals enforced the Board's supplemental order in an unpublished memorandum decision. The court ruled that, since the Board's order in the unfair labor practice proceeding required petitioners to honor the labor contract, the Board did not abuse its discretion in ordering petitioners to make retroactive contributions to the Union's benefit funds. Pet. App. A4. The court rejected petitioners' claim that they are liable to the funds only to the extent claims were actually made against them, finding that "[e]ven if the union fund meets 'the present needs of its employees, the diversion of contributions from the union funds undercut the ability of those funds to provide for future needs.'" *Ibid.*, quoting *Stone Boat Yard* v. *NLRB*, 715 F.2d 441, 446 (9th Cir. 1983). Further, the court ruled that, because Holland House is "clearly the successor to [JRR]" and had admitted that it "took control with knowledge of [JRR's] entanglement with the [Board]," Holland House was obliged to remedy JRR's unfair labor practices under *Golden State*.[8] Pet. App. A5.

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entitled to receive backpay. The Board agreed with the General Counsel that petitioners are liable for those contributions. Pet. App. A13. Second, the ALJ construed the collective bargaining agreement, which was effective April 1979 to April 1982, to provide that petitioners would follow any increase in benefit-fund contribution rates negotiated between the Union and the Realty Advisory Board (RAB) in 1981, but not any later negotiated increases. The Board agreed with the Union that the collective bargaining agreement requires petitioners to follow increases negotiated by the Union and the RAB in both 1981 and in 1984. *Id.* at A20.

[8] The court of appeals also affirmed the Board's construction of the benefit increase provision in the collective bargaining agreement, Pet. App. A4-A5, and the Board's disposition of the liquidated damage issue, *ibid.* See notes 6-7, *supra*. Petitioners do not seek further review of those rulings.

ARGUMENT

1. Petitioners contend (Pet. 10-15) that the Board's supplemental order requiring them to make retroactive benefit fund contributions is "punitive" and therefore beyond the Board's remedial authority under Section 10(c) of the Act, 29 U.S.C. 160(c). That contention lacks merit. It is, of course, well settled that the Act is "essentially remedial," *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 10 (1940), and that Section 10(c) "does not authorize punitive measures," *NLRB* v. *Strong Roofing & Insulating Co.*, 393 U.S. 357, 359 (1969). "[M]aking the workers whole for losses suffered on account of an unfair labor practice," however, "is part of the vindication of the public policy which the Board enforces." *Ibid.*, quoting *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941). In *Strong Roofing*, this Court upheld a Board order which directed the employer to make payments to the union's benefit funds according to the terms of the collective bargaining agreement that the employer had repudiated in violation of the Act. The Court explained:

> Whether the payments were made to the employees, who then contributed them to union trust funds in the form of higher union dues, or whether as here they passed straight from the employer to the trust funds * * * it is just as much in the interest of "effectuat[ing] the policies of this Act," and of making the employees whole, to require the payments in either case.

393 U.S. at 360 n.4.

The Board ordered the same type of make-whole relief in its supplemental order here. Employer contributions to fringe benefit funds are the equivalent of wages that the employees have earned by their labor. See *Strong Roofing*, *supra*; *Artim Transp. Sys. Inc.*,

193 N.L.R.B. 179, 184 (1971); *Hen House Market No. 3*, 175 N.L.R.B. 596, 596 (1969), enf'd *sub nom. Hinson* v. *NLRB*, 428 F.2d 133 (8th Cir. 1970). The Board, with court approval, has often ordered the offending employer to make retroactive payments of all benefit fund payments required by the collective bargaining agreement in order to restore the *status quo ante*. See, *e.g.*, *Achilles Constr. Co.*, 290 N.L.R.B. 240 (1988), enf'd mem., 875 F.2d 308 (2d Cir.), cert. denied, 493 U.S. 823 (1989); *Kraft Plumbing & Heating, Inc.*, 252 N.L.R.B. 891 (1980), enf'd mem., 661 F.2d 940 (9th Cir. 1981); *Michigan Drywall Corp.*, 232 N.L.R.B. 120 (1977), enf'd, 616 F.2d 966 (6th Cir. 1980); *Hen House Market No. 3, supra*. The Board's supplemental order simply requires petitioners to make contributions to the Union's funds as required by the collective bargaining agreement. Pet. App. A21-A25.

Petitioners assert (Pet. 11, 14) that requiring them to make retroactive benefit fund contributions is "punitive" and constitutes a "windfall" for the Union because there has been no showing of losses to the employees. The Board and the court of appeals correctly rejected that assertion. Unlike in *Coletti Color Prints, Inc.*, 204 N.L.R.B. 647, where the union had lost a Board election after the collective bargaining agreement had expired and the employees could benefit from the funds only during the life of the expired agreement, here, the Union continues to represent the bargaining unit and the employees have a continuing interest in the funds. Pet. App. A15 n.7; *Pacific Aggregates, Inc.*, 231 N.L.R.B. 214, 221-222 (1977); *Argano Elec. Corp.*, 248 N.L.R.B. 352, 360-361 (1980). Even though the funds may be able to meet the employees' present needs, the absence of benefit contributions would compromise the funds' ability to provide for their needs in the future.

There is no merit to petitioners' contention (Pet. 12-15) that the decision below conflicts with *Manhattan Eye Ear & Throat Hosp.* v. *NLRB*, 942 F.2d 151 (2d Cir. 1991). In that case, the Board required an employer to make retroactive contractual payments to union-sponsored benefit funds, even though the employer had provided alternative benefits coverage for its employees and the employees had decertified the union that negotiated the plans and had disclaimed any interest in future coverage under those plans. 942 F.2d at 154-155, 159. The Second Circuit declined to enforce the Board's order, holding that it was error to require contractual payments to the union's benefit funds "regardless of the nature or scope of the substitute benefits provided to the employees in the interim." *Id.* at 159. This case implicates none of the concerns identified in *Manhattan Eye*. Here, the employer did not provide substitute, non-contractual benefits; moreover, the members of the bargaining unit continue to be represented by the union that negotiated the benefit plans, and have never disclaimed their contractual right to coverage under those plans. Pet. App. A15 n.7, A33, A34, A35. *Manhattan Eye* is therefore inapplicable here.[9]

Petitioners also make several factbound objections to the nature of the evidence underlying the Board's order, none of which warrants further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-

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[9] The *Manhattan Eye* court emphasized that it was not questioning the Board's power "to order imposition of the *status quo ante* in other cases where an employer unilaterally discontinues payments to union-sponsored benefit funds." 942 F.2d at 159. The court was careful to limit its ruling to situations in which the employees involved "were compensated during the relevant period by substitute benefit plans and who * * * disclaimed any present or future interest in being covered by the [union-sponsored plans]." *Ibid.*

491 (1951). In any event, those objections lack merit. Contrary to petitioners' contention that all of the employees' claims under the funds were settled, see Pet. 14, the parties settled only the backpay claims of the discharged employees, and those employees who replaced them, for the time period prior to January 1, 1989; the Regional Director's corresponding claims for fund contributions were not settled. Pet. App. A16 n.8, A29; see note 5, *supra*. Petitioners are also incorrect in claiming (Pet. 14-15) that, because the discharged employees refused reinstatement, they retained "no further economic interest in the [Union funds'] future." The discharged employees retain an interest in the funds because their right to receive benefits in the future depends on their having been covered by Union contracts for a specified minimum length of time, and the Union continues to be their collective bargaining representative.[10] Pet. App. A15 n.7; *Argano Elec. Corp.*, 248 N.L.R.B. at 361.

2. Holland House contends (Pet. 15-21) that it is not liable as a successor employer for contributions to the Union's benefits funds. The court of appeals correctly held that Holland House "is clearly the successor to J.R.R." and that, as it had notice of the unfair labor practice charge, it is liable under *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973). Pet. App. A5.[11]

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[10] The Regional Director noted in his amended backpay specification that three of the discharged employees had found other jobs covered by Union contracts. C.A. App. 140 n.1.

[11] In passing, Holland House suggests (Pet. 17) that it was "questionable" whether it had knowledge of JRR's unfair labor practices when it acquired the building. Not only did Holland House make an admission to the contrary in the Board proceedings, Pet. App. A32, it knew of JRR's potential liability through Chaim Babad, who was a partner in JRR and is the majority shareholder in Holland House. *Id.* at A41. Indeed,

Holland House nevertheless contends that the Board's order conflicts with the principle announced in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), that a successor is ordinarily free to establish its own terms of employment. Relying on *Martin J. Barry Co.*, 278 N.L.R.B. 393 (1986), and *Sea Bay Manor Home for Adults*, 301 N.L.R.B. No. 71 (Jan. 31, 1991), Holland House asserts that it is not liable for contributions that accrued *after* it acquired the apartment building from JRR in 1984. In *Martin J. Barry Co.* and *Sea Bay Manor Home*, the Board ordered the successor employer to restore the *status quo ante* as prescribed by its predecessor's collective bargaining agreement, but ruled that the successor's obligation to maintain the *status quo ante* ended as of the date that the successor assumed operation of the predecessor's business. In each case, the Board determined that even though the new employer was a successor under *Golden State Bottling Co.* v. *NLRB*, *supra*, a *Golden State* successor retains the freedom afforded a successor employer by *Burns* to refuse to honor the terms of his predecessor's labor agreement.[12] Accordingly, the Board ruled that the successor could not be ordered to maintain the *status quo ante* beyond the date it commenced operations because that requirement would be tantamount to forcing the successor to honor the predecessor's collective

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Babad was "the main actor in the commission of the violations [of the Act] by [JRR]." *Id.* at A43; *J.R.R. Realty Co.*, 273 N.L.R.B. at 1525-1526.

[12] In *Burns* the Court held that a successor employer is not bound to observe the substantive terms of his predecessor's collective bargaining agreement, 406 U.S. at 291; the successor "is ordinarily free to set initial terms on which it will hire the [predecessor's] employees." *Id.* at 294.

bargaining agreement. *Martin J. Barry Co.*, 278 N.L.R.B. at 394-395; *Sea Bay Manor Home*, slip op. at 2-3, 5-6.

Those cases, however, did not involve a successor who, like Holland House, made it "perfectly clear" (*Burns*, 406 U.S. at 294-295) that it was continuing the employment of the predecessor's employees under the preexisting terms of employment, and, indeed, manifested an intention to honor its predecessor's labor contract when it commences operations. Such a successor does not have complete freedom to establish its initial terms unilaterally. Rather, as the Court explained in *Burns*, when it is "perfectly clear that the new employer plans to retain all of the employees in the unit," it may "be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Ibid.* In this case, the ALJ found, and the Board implicitly agreed, that, because Holland House had made it "perfectly clear" that it was continuing the employment of JRR's workforce, Holland House could not, under *Burns*, set its own initial terms without first bargaining with the Union. Pet. App. A41; *Burns*, 406 U.S. at 294-295. Holland House does not challenge that ruling here.

Both before the Board and in the court of appeals Holland House agreed that it was "'perfectly clear' that the replacement[] [employees] * * * would not have any changes imposed on them on Holland House's takeover." Pet. C.A. Br. 21; Pet. Board Br. 13. Similarly, the ALJ found that Holland House subsequently informed the Regional Director that it would abide by JRR's collective bargaining agreement. Pet. App. A35. Accordingly, the Board's order requiring Holland House to make payments to the Union's funds accruing after it commenced operation of the apartment building is consistent with the

framework of rules governing a successor's obligations under *Burns* and with Board precedent applying those rules.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JRR REALTY and HOLLAND HOUSE TENNANTS CORPORATION

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This Memorandum is written in reply to the Answering Brief filed by Respondent National Labor Relations Board. ("NLRB", "Board") It is filed in support of the instant petition for certiorari.

ISSUE PRESENTED

Does this Court desire to reconcile its decision in Golden State Bottling v. NLRB, 414 US 168 (1973) which held that a successor can be liable for a predecessor's unfair labor practice, with its decision in NLRB v. Burns Security, Inc., 406 US 272 (1972) which held that a successor is not bound to the substantive terms of its predecessor's contract, where the predecessor's unfair labor practice is the act of abrogation of its contract?

POINT I

THE BOARD HAS NOT DISTINGUISHED THE CASES CITED BY THE SECOND CIRCUIT

The Board's statement (Ans. Br. Pg 4) that its "...order to make payments to the Union's..." funds, where no proof of loss exists, is based "...on settled law" can only be termed as lacking in candor. As noted in the petition for certiorari, the Second Circuit recognized that two lines of cases were emerging from the Board at the same time. (Pet. for Cert. at 11-12) One line required payments to the funds, another required proof of loss. The Board distinguishes only one of the cited cases in its answer, Colletti Color, 204 NLRB 147 (1973) and that in a manner starkly different from the Board ALJ in this case. (See Pet. App at A-44) The Board does not distinguish any others and does not even deal with the

entire existence of a second strain of decisions noted by the Second Circuit.

In distinguishing Manhattan Eye, Ear and Throat Hospital v. NLRB, 942 F2d 151 (August 15, 1991) the Board notes that in this case "...the employer did not provide substitute, non contractual benefits..." (Ans. Br. at 10) to the employees. Missing from the answering brief is any indication that the employer requested "...that the union permit respondents to provide health coverage to the current employees" (Pet. App. at 36) and that implementation, unilaterally, of another health plan would itself be an unfair labor practice. NLRB v. Katz, 369 US 736 (1962); Clear Pine Moldings, 238 NLRB 69, 79-80 (1978), enforced 632 F2d 721, 729. Surely the Board is not arguing that because the respondent in

Manhattan Eye and Ear, violated the Act by instituting substitute coverage unilaterally, that it therefore is relieved of remedial responsibility. In fact, the Board in that case, and in Clear Pine Molding, supra, provided for the exact remedy that the Second Circuit rejected. Accordingly the Board grasps at a distinction without legal difference.

The Board also argues (Ans. Br. at Pg. 11) that although the discharged employees refused reinstatement they still had an interest in the funds, on which no claims were made, receiving a windfall. There is no record evidence to support the Board's argument that the employees' "...right to receive benefits in the future depends on their having been covered by union contracts for a

specified minimum length of time..." Rather the nature of the windfall becomes plain when the Board notes that "...three of the discharged employees had found other jobs covered by union contracts" and, presumably, had had contributions made on their behalf by the new employers. (Ans. Br. at fn 10)

There is therefore a clear conflict in the duty to make-whole employees where fund contributions are in issue between the Second and D.C. Circuits. See also Rice Lake Creamery, 151 NLRB 1113, 1129; Deena Artware, 112 NLRB 371, 375; Overnite Transportation, 197 NLRB 894, 896 (1972); Southland Dodge, 232 NLRB 878, 879 (1977); Am-Del Co., 234 NLRB 1040, 1043.

POINT II

THE SUCCESSOR, HOLLAND HOUSE, REQUIRES THIS COURT'S RESOLUTION OF THE GOLDEN STATE AND BURNS DOCTRINES OF THIS COURT

The thrust of the petition for certiorari regarding Holland House, the successor to JRR Realty Co, is that the important policy considerations that this Court announced in Burns, supra, preclude requiring a successor to honor a predecessor's labor contract where the predecessor's unfair labor practice was itself the failure to honor a labor contract. The answer (Ans. Br. at 7 fn 7, 8) seriously misreads the petition in asserting that the issue concerning increases in amounts and liquidated damages were areas where "Petitioners do no seek further review." In fact, both issues are specifically raised in the petition (Pet. for Cert. at 21)

Moreover, the Board's elaborate

attempt to explain away this Court's and the Board's holdings that a successor with knowledge of a predecessor's unfair labor practice of failing to honor a contract is bound to remedy the violation only to the day of its takeover (Ans. Br. at 12-14) is faulty by those very findings.

The Board states that under Burns where it is "perfectly clear" that no changes will be made by a successor there is a duty to "consult" with the incumbent union before a successor can make unilateral changes. This freezing of the situation however does not bind the successor to the predecessor's contract terms. Accordingly, while the successor could be required to keep the exact terms in place, there is no requirement that later contractual increases or changes are binding on the successor since these are substantive

contractual terms to which the successor is not bound. Nor can the successor be bound to the contractual provisions of its predecessor to pay liquidated damages, since this too binds the successor to substantive contract terms. Accordingly the Boards attempt to explain away the irreconcilable is unavailing.[1]

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1. The Board incorrectly notes that the successor, Holland House, agreed to honor the predecessor's contract. (Ans. Br. at 13) First, this was in the context of settlement and took place in 1987, three years after the successor's takeover. Secondly, there was no finding below that the successor, in fact, adopted the predecessor's contract terms at any time, much less at its takeover. Similarly the Board errs in asserting that the underlying order in this case specifically required payment to the funds. (Ans. Br. at fn 3) In this regard this underlying order should be compared to those found in the cases cited in the petition for certiorari at page 11. The difference is stark.

CONCLUSION

This Court should grant certiorari so that these two important labor law issues can be properly briefed and determined.

Respectfully submitted,

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